THE

CODE OF ALABAMA,

ADOPTED BY ACT OF THE GENERAL ASSEMBLY APPROVED

FEBRUARY 28, 1887;

WITH SUCH STATUTES PASSED AT THE SESSION OF 1886-87, AS ARE REQUIRED TO BE INCORPORATED THEREIN BY ACT APPROVED FEBRUARY 21, 1887; AND WITH CITATIONS OF THE DECISIONS OF THE SUPREME COURT OF THE STATE CONSTRUING THE STATUTES.

IN TWO VOLUMES.

VOL. I.

PREPARED BY

ROBERT C. BRICKELL, PETER HAMILTON AND JOHN P. TILLMAN,

COMMISSIONERS.

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1887.

Entered according to Act of Congress, in the year 1887, by
THOMAS SEAY, as Governor of the State of Alabama, for the use of said State,
In the Office of the Librarian of Congress, at Washington, D. C.

CERTIFICATE OF COMMISSIONER.

I, JOHN P. TILLMAN, Commissioner having in charge the publication of the Code of Alabama, adopted by act of the General Assembly, approved February 28th, 1887, do hereby certify that I have compared the Code, as printed, with the original, as adopted by the General Assembly; and that the Code, as printed, and as corrected by the Tables of Errata appended to the two volumes, is the same as adopted by the act of the General Assembly above noted.

JOHN P. TILLMAN,
Commissioner.

PREFACE.

THE second section of the act adopting the Code, and the third section of the act providing for its publication, prescribe what statutes passed at the last session of the General Assembly should be incorporated therein. It seems clear that the General Assembly contemplated only the incorporation of those acts which, in express terms, amend sections of the Code of 1876, and not statutes which work changes or amendments therein, by construction, or statutes which amend acts passed after its adoption. *Substitution*, not *codification*, is clearly directed. Owing to the character of the work of the Code Commissioners, they having re-written and re-arranged many of the sections of the Code of 1876, and most of the statutes passed after its adoption prior to the last session, substitution of statutes which in express terms amended sections of that Code, was, in some instances, impracticable; the Commissioner has, therefore, only incorporated in the Code such of those statutes as were susceptible of *substitution* for corresponding sections of this Code as adopted, and has given in notes those that could not be thus substituted. Notes have also been made of other amendatory acts, as well as of the general acts not purporting to amend prior statutes, passed at the last session, some being given in full, while references only are made to others.

The act dividing the State into four Chancery Divisions, and providing for holding courts therein, and the several acts changing the times of holding the Circuit Court in several circuits, passed at the last session, repealed, of course, prior statutes of force relating to the same subject-matter, which were embodied in the Code as adopted. The act relating to married women and their separate property, forming sections 2341 to 2351, inclusive, of the Code, as printed, expressly repealed numerous sections of the Code of 1876, which were brought forward into this Code, as adopted, without change; and the act of February 28th, 1887, in reference to the sale of cotton, forming sections 1186 and 1187 of the Code, as printed, expressly repealed sections 1411 and 1412 of the Code of 1876, which were also brought forward into this Code, as adopted. While not authorized by the act providing for the publication of the Code, the Commissioner thought best to omit the provisions thus repealed, and substitute therefor the provisions of the new statutes. This has necessarily required a renumbering of the sections of the Code, and a corresponding change in those sections in which references by numbers were made to other sections.

The provisions required to be printed in the second volume, designated in the act providing for the publication of the Code as the "Criminal Code," as adopted, were arranged in parts, chapters and articles, and the chapters were numbered consecutively through the volume. To bring this volume, in arrangement, into harmony with the first volume, it has been designated as Part Fifth, and the term *parts* has been changed to *titles*, and the chapters numbered by titles. The Code Commissioners intended to make these changes before reporting the work, but overlooked them. They are mere changes in nomenclature, and not in actual arrangement. The numbering of the sections of the second volume, as changed by the joint committee, commenced at 4000. It was, doubtless, the purpose of the committee to commence the numbering of this volume where the first volume left off. The Commissioner has changed the numbering so as to make the numbers of the sections run consecutively through the entire Code.

The section mark, at the beginning of each section, has been omitted, as its insertion, in the type required, would have greatly marred the appearance of the book, without serving any good purpose. The references to the contents of sections, found at the beginning of each section, corresponding to the italic lines in the Code of 1876, and to the antique-letter lines in this Code, have been treated as merely marginal notes, and, in many instances, have been abridged.

The annotations to the Constitution and the first volume are of the decisions of the Supreme Court from Minor to volume 78 of Alabama Reports, inclusive; those to the second volume are of the decisions of the Supreme Court from Minor to volume 76 of Alabama Reports, inclusive. The Commissioner had also intended to note all the decisions of the Supreme Court construing the Rules of Practice, but he has not had the time to do so; he, however, has made references to such of the decisions as he had noted for his private use.

The arrangement of the second volume, and the annotations and index thereto, are the work of F. B. Clark, Esq., of Mobile. Acknowledgment is also made, on behalf of the Code Commissioners, to P. J. Hamilton, Esq., of Mobile, for valuable services rendered by him in the preparation of the work.

August 1st, 1887.

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ACTS ADOPTING AND PROVIDING FOR PUBLICATION OF CODE.

AN ACT to adopt a Code of Laws for the State of Alabama.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the work prepared by Robert C. Brickell, Peter Hamilton, and John P. Tillman, under "An Act to provide for the revision and codification of the public statutes of this State, both civil and criminal," approved February 17th, 1885, is, as the same has been corrected, amended, and reported by the joint committee of the two houses of the general assembly, adopted and enacted as the Code of Alabama, and shall regulate completely, so far as a statute may, the subject to which it relates, and shall go into force and be operative on the thirtieth (30th) day after the date of the governor's proclamation announcing its publication.

SEC. 2. No act passed at the present session of the general assembly shall be repealed or affected in any manner by the adoption of this Code; but all acts amending sections of the Code of 1876, which sections have been incorporated in this Code, shall be printed in the place of and as such sections.

Approved February 28th, 1887.

AN ACT to provide for the publication and distribution of the Code of Alabama.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, The governor shall secure the State the copyright of the Code of Alabama adopted at this session of the general assembly.

SEC. 2. The commissioners who codified and revised the statutes of the State are required to supervise the publication of the Code. They shall read all proof, correct all manifest clerical errors, and compare it with the original manuscript, and see that the Code, as printed, corresponds accurately with the original as adopted.

SEC. 3. The commissioners shall, in arranging the Code, have the certificate hereinafter provided for, and the act adopting the Code, printed in the first volume, next after the title page; then the Constitution (1875), with citations to every decision of the supreme court construing that section, or construing a section or provision of any former Constitution of Alabama substantially the same, inserted below every section, and before the next section; then the Civil Code, from sections one to thirty-seven hundred and fourteen, both included, as shown on the manuscript; then rules of court and practice; and then the index to the first volume, including therein the index to the Constitution. The second volume shall contain the Criminal Code, from section four thousand to section five thou-

sand one hundred and ninety-nine (5199), both included, as shown on the manuscript, and the index to the second volume. They shall substitute for any section, as shown in the manuscript, the same section as amended by any act passed at the present session of the general assembly, as fully and completely, without codification, as though said section, as amended and passed, had been originally written in said manuscript.

SEC. 4. The commissioners shall insert, immediately after each section of the Code, and before the next section, annotations giving full citations to the decisions of the supreme court construing that section.

SEC. 5. That five thousand (5,000) copies of the Code shall be printed and bound for the use of the State. The paper thereof shall be of the weight and quality at least equal to that of the Code of 1876, the pages of the same size, the same number of ems and type for the text and numbers in brackets, but the figures numbering the sections shall be of antique type, and the annotations, citations, and marginal references shall be of the same type as the foot-notes of the Code of 1876. The Code shall be bound in two volumes, in law sheep of a good quality, and as good workmanship as the Code of 1876.

SEC. 6. When the printing of the Code is completed, the commissioners, or commissioner, who compare it with the original manuscript, shall certify the same to have been compared with the original as adopted by the general assembly, and that the Code, as printed, is the same as adopted, which certificate must be printed in each copy of the Code; and the Code thus printed and published must be received as the law in all courts and in all proceedings before any board, body, or officer in this State, subject to correction by the original manuscript, which shall be kept on file in the office of the secretary of state.

SEC. 7. Within ten days after the approval of this act, the governor shall advertise for bids to print and bind the Code in accordance with this act, and shall award the contract to the lowest responsible bidder. The bids must be accompanied by a bond in not less than thirty thousand dollars, with sureties to be approved by the governor, if the bid should be accepted, conditioned to faithfully perform the contract, which shall be drawn by the attorney-general, and approved by the governor, the auditor, and treasurer; *Provided*, That the said sureties on said bond shall be resident citizens of this State. The governor shall fix the maximum price, not to exceed four dollars a copy of two volumes, and shall not award the contract to any person bidding above the maximum so fixed by him. The governor may, when the entire work is delivered to the binders, pay the contractor such part of the agreed price as he may deem just, not to exceed two-thirds of the whole sum to be paid for the entire work.

SEC. 8. The governor shall have the manuscript carefully copied, under the direction of the commissioners, and the copy only sent to the printers for use; and as fast as copied the original manuscript shall be substantially bound in books of convenient size, and deposited in the office of the secretary of state.

SEC. 9. The commissioners, for performing all the services required of them by this act, shall receive two thousand dollars, one thousand dollars when the work is all delivered to the binders, and one thousand dollars when the five thousand copies are delivered to the secretary of state. Unless one or more of the commissioners notify the governor, in writing, in twenty days after the approval of this act, that they will undertake to discharge personally the duties required of them hereby, for the compensation herein specified, the governor shall appoint some competent attorney as commissioner to discharge the duties imposed by this act.

SEC. 10. Upon the delivery of the five thousand copies of the Code to

the secretary of state, the governor must thereupon make proclamation announcing that fact, and that the Code will go into effect and become operative on the thirtieth day after the date of said proclamation.

SEC. 11. The secretary of state must retain for use of the executive officers and the two houses of the general assembly, three hundred copies of the Code, and must transmit to the department of state of the United States two copies; to the executive of each State and Territory, two copies; to the librarian of the University and of the Agricultural and Mechanical College, and of the Deaf and Dumb and Blind Institute, and of the Insane Hospital, two copies each; and shall deliver to the librarian of the supreme court ten copies for the use of the library, and to the probate judges of each county, for such judge, the clerks of the circuit court and city court, sheriff, register in chancery, and each justice of the peace of the county, one copy each.

SEC. 12. The copies distributed under this act to any officer shall belong to the office, and not to the individual; and any officer, or, in case of his death, the executor or administrator of such officer, failing to deliver such copy on demand of his successor, must, on conviction, be fined not less than twenty-five dollars; and justices of the peace have jurisdiction of any violation of this act.

SEC. 13. For the purpose of making a correct distribution of the Code to the county officers entitled to the same, the secretary of state shall deliver to each probate judge such number of copies as by the written requisition of the probate judge may be shown that his county is entitled to receive. Such requisition must give the name and office of each officer for whom the requisition is made, and the probate judge must take from each officer to whom a Code is delivered a receipt, which receipt he must file in the office of the secretary of state; and he shall be responsible for all copies delivered to him, and for which he has not filed the receipt of the person entitled thereto in the office of the secretary of state.

SEC. 14. That all the rest of the copies of the Code left after the distribution above provided for the secretary of state shall retain, and may sell at four dollars per copy of two volumes, but shall not sell to any one individual, corporation, or firm more than ten copies.

SEC. 15. The governor shall have printed five hundred copies of the regulations of the Harbor of Mobile and of the law relating to ships and seamen, as revised and codified, but not included in the Code, but not thereby repealed; and when printed they shall be deposited with the secretary of state, to be by him sold at twenty-five cents per copy.

Approved February 21st, 1887.

CONSTITUTION OF THE UNITED STATES.

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

SECTION I. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III. 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

Section IV. 1. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section V. 1. Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and, from time to time, publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section VI. 1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason,

felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION VII. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by two-thirds of that House, it shall become a law. But in all such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII. The Congress shall have power,—

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coins, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post-offices and post-roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION X. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass

any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

*3. [The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such a number be a majority of the whole number of Electors appointed; and if there be more than one who have such a majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of the States shall be necessary to a choice. In every case after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President; but if there should remain two more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]

4. The Congress may determine the time of choosing the Electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

5. No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

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*This 3d clause (of the 1st section of article 2d) has been superseded by the 12th amendment. *Vid. post*, p. 14.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION II. 1. The President shall be Commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors and other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session.

SECTION III. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at

stated times receive for their services a compensation, which shall not be diminished during their continuance in office.

SECTION II. 1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between citizens of different States; between a State and citizens of another State; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed, but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed.

SECTION III. 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION I. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION IV. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence.

ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution; or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; *Provided*, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

1. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States, under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America, the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON,
President, and Deputy from Virginia.

New Hampshire.

JOHN LANGDON,
NICHOLAS GILMAN.

Massachusetts.

NATHANIEL GORMAN.
RUFUS KING.

Delaware.

GEORGE REED,
GUNNING BEDFORD, JR.,
JOHN DICKINSON,
RICHARD BASSETT,
JACOB BROOM.

Connecticut.

WILLIAM S. JOHNSON,
ROGER SHERMAN.

New York.

ALEXANDER HAMILTON.

New Jersey.

WILLIAM LIVINGSTON,
DAVID BREARLY,
WILLIAM PATTERSON,
JONATHAN DAYTON.

Pennsylvania.

BENJAMIN FRANKLIN,
THOMAS MIFFLIN,
ROBERT MORRIS,
GEORGE CLYMER,
THOMAS FITZSIMONS,
JARED INGERSOL,
JAMES WILSON,
GOVERNEUR MORRIS.

Maryland.

JAMES MCHENRY,
DANIEL OF ST. THO. JENIFER,
DANIEL CARROLL.

Virginia.

JOHN BLAIR,
JAMES MADISON, JR.

North Carolina.

WILLIAM BLOUNT,
RICHARD DOBBS SPAIGHT,
HUGH WILLIAMSON.

South Carolina.

JOHN RUTLEDGE,
CHARLES C. PINCKNEY,
CHARLES PINCKNEY,
PIERCE BUTLER.

Georgia.

WILLIAM FEW,
ABRAHAM BALDWIN.

Attest: WILLIAM JACKSON, *Secretary.*

AMENDMENTS.

ARTICLE I.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

*March 4, 1879; ratified December 15, 1791.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.*

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII.†

The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhab-

*December 2, 1793; ratified January 8, 1798. †October 17, 1803; ratified September 25, 1804.

DO NOT REMOVE

itant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose, immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such a number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose a Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.*

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.†

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof,

*Adoption proclaimed by the Secretary of State, December 18, 1865.
†Adoption proclaimed by the Secretary of State, July 20, 1868.

is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.*

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

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*Adoption proclaimed by the Secretary of State, March 30, 1870.

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CONSTITUTION OF THE STATE OF ALABAMA.

1875.*

PREAMBLE.

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure to ourselves and to our posterity life, liberty, and property, profoundly grateful to Almighty God for this inestimable right, and invoking His favor and guidance, do ordain and establish the following Constitution and form of government for the State of Alabama.

ARTICLE I.

DECLARATION OF RIGHTS.

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare,—

Effect and office of declaration of rights. Ex parte Dorsey, 7 Port., 293.

§ 1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

A guarantee to each citizen of all the rights and privileges enjoyed or possessed by any other citizen. Ex parte Dorsey, 7 Port., 293. **Free egress from, or transit through the State,** while it may be regulated, cannot be prevented. Joseph v. Randolph, 71 Ala., 499.

§ 2. That all persons resident in this State, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights.

South & North A. R. R. Co. v. Morris, 65 Ala., 193; Burns v. State, 48 Ala., 195.

§ 3. That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government, in such manner as they may deem expedient.

§ 4. That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship, nor to pay any tithes, taxes, or other rate, for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust, under this State; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles.

Frolickstein v. Mayor, 40 Ala., 725.

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* Became operative December 6th, 1875.

§ 5. That any citizen may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

§ 6. That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable seizures or searches; and that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation.

Not an arrest without a warrant, but the issue of a warrant without oath or affirmation, is forbidden. Williams v. State, 44 Ala , 41.

§ 7. That in all criminal prosecutions the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and in all prosecutions by indictment, a speedy public trial, by an impartial jury of the county or district in which the offense was committed; and that he shall not be compelled to give evidence against himself, nor be deprived of his life, liberty, or property but by due process of law.

Right of accused to be heard by himself and counsel, or either.—State v. Hughes, 2 Ala., 102; State v. McCall, 4 Ala., 643; Withers v. State, 36 Ala., 252; Ex parte Bryan, 44 Ala., 404; Slocovitch v. State, 46 Ala., 227. **To demand the nature and cause of the accusation, and to have a copy thereof.**--Noles v. State, 24 Ala , 672; Burdine v. State, 25 Ala., 60; Thompson v. State, 25 Ala., 41; Schwartz v. State, 37 Ala., 460; Driskill v. State, 45 Ala., 21; Miller v. State, Ib., 24. **To be confronted by the witnesses against him.**—Rosenbaum v. State, 33 Ala., 354; State v. Buckley, 54 Ala., 599; Green v. State, 66 Ala., 40; Wills v. State, 73 Ala., 362. **In all prosecutions by indictment, to a speedy public trial, etc.**—Tims v. State, 26 Ala., 165; State v. Buckley, 54 Ala., 599; Connelly v. State, 60 Ala., 89; Bales v. State, 63 Ala., 30; Ex parte The State, 76 Ala., 482. **Shall not be compelled to give evidence against himself.**—Kelly v. State, 72 Ala., 244. **Nor be deprived of his life, liberty, or property but by due process of law.**—Ex parte Dorsey, 7 Port., 293; Wammack v. Holloway, 2 Ala., 31; Martin's Ex'rx v. Martin, 25 Ala., 201; Powell v. Sammons, 31 Ala., 552; Bramlett v. State, Ib., 376; Dorman v. State, 34 Ala., 216; Sadler v. Langham, Ib., 311; Ingram v. State 39 Ala , 247; Weaver v. Lapsley, 43 Ala., 224; Hood v. State, 44 Ala., 81; Ex parte Candee, 48 Ala., 386; Stoudenmire v. Brown, Ib., 699; Barnes v. State, 49 Ala., 342; Wright v. Ware, 50 Ala., 549; Whitworth v. Anderson, 54 Ala., 33; Dillard v. Webb, 55 Ala., 468; Davis v. Minge, 56 Ala., 121; Todd v. Flournoy, Ib., 99; Stoudenmire v. Brown, 57 Ala., 481; Zeigler v. South & North R. R. Co., 58 Ala., 594; Calhoun v. Fletcher, 63 Ala., 574; Wilburn v. McCalley, Ib., 436; Mead v. Larkin, 66 Ala., 87; Davis v. State, 68 Ala., 58; Betancourt v. Eberlin, Adm'r, 71 Ala., 461; Ex parte Macdonald, 76 Ala., 603.

§ 8. That no person shall be accused, or arrested, or detained, except in cases ascertained by law, and according to the forms which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense, and legally applied.

State v. Middleton, 5 Port., 484; State v. Kreps, 8 Ala., 951; Nelson v. State, 39 Ala., 667; Aaron v. State, Ib., 684; Eliza v. State, Ib., 693; Witherby v. State, Ib., 702; Ferdinand v. State, Ib., 706; Bell v. State, 48 Ala., 684.

§ 9. That no person shall, for any indictable offense, be proceeded against criminally, by information; except in cases arising in the militia and volunteer forces when in actual service, or, by leave of the court, for misfeasance, misdemeanor, extortion and oppression in office, otherwise than is provided in this Constitution; *Provided*, That in cases of petit larceny, assault, assault and battery, affray, unlawful assemblies, vagrancy, and other misdemeanors, the general assembly may, by law, dispense with a grand jury, and authorize such prosecutions and proceedings before justices of the peace, or such other inferior courts as may be by law established.

State v. Middleton, 5 Port., 484; Noles v. State, 24 Ala., 672; Thompson v. State, 25 Ala. 41; Williams v. State, 61 Ala., 33.

§ 10. That no person shall, for the same offense, be twice put in jeopardy of life or limb.

State v. Phil, 1 Stew., 31; Ned v. State, 7 Port., 187; State v. Hughes, 2 Ala., 102; State v. Abram, 4 Ala., 272; State v. Slack, 6 Ala., 676; The State, ex rel. Battle, 7 Ala., 259; Cobia v. State, 16 Ala., 781; McAuley v. State, 26 Ala., 130; Hughes v. State, 35 Ala., 351; Barrett v.

State, 35 Ala., 406; Turner v. State, 40 Ala., 21; Waller v. State, 40 Ala., 325; Jeffries v. State, 40 Ala., 381; Grogan v. State, 44 Ala., 9; Bell v. State, 48 Ala., 684; Wetson v. State, 63 Ala., 155; Kendall v. State, 65 Ala., 492; Morrisette v. State, 77 Ala., 71.

§ 11. That no person shall be debarred from prosecuting or defending, before any tribunal in this State, by himself, or counsel, any civil cause to which he is a party.

May v. Williams, 17 Ala., 23; Withers v. State, 36 Ala., 252; South & North R. R. Co. v. Morris, 65 Ala., 193; Lassitter v. Lee, 68 Ala., 287.

§ 12. That the right of trial by jury shall remain inviolate.

Ex parte Dorsey, 7 Port., 293; Wammack v. Holloway, 2 Ala., 31; Boring v. Williams, 17, Ala., 510; Tims v. State, 26 Ala., 165; McCauley v. State, Ib., 135; Bramlett v. State, 31 Ala., 376; Powell v. Sammons, Ib., 552; Thomas v. Bibb, 44 Ala., 721; State v. Buckley, 54 Ala., 599; Sanders v. State, 55 Ala., 42; Connelly v. State, 60 Ala., 89; Chambers v. Stringer, 62 Ala., 596.

§ 13. That in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and that in all indictments for libel, the jury shall have the right to determine the law and the facts, under the direction of the court.

§ 14. That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Martin v. Martin, 25 Ala., 201; Ex parte Pollard, 40 Ala., 77; South & North R. R. Co. v. Morris, 65 Ala., 193; Lassitter v. Lee, 68 Ala., 287.

§ 15. That the State of Alabama shall never be made defendant in any court of law or equity.

Comer v. Bankhead, 70 Ala., 493.

§ 16. That excessive fines shall not be imposed, nor cruel or unusual punishments inflicted.

§ 17. That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great; and that excessive bail shall not, in any case, be required.

Ex parte Simmonton, 9 Port., 390; Ex parte Croom, 19 Ala., 561; Ex parte Andrews, 19 Ala., 584; Ex parte McCrary, 22 Ala., 65; Ex parte Banks, 28 Ala., 89; Ex parte Howard, 30 Ala., 43; Ex parte Bryant, 34 Ala., 270; Ex parte Nettles, 58 Ala., 268; Ex parte Acree, 63 Ala., 234.

§ 18. That the privilege of the writ of *habeas corpus* shall not be suspended by the authorities of this State.

§ 19. That treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and that no person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or his own confession in open court.

§ 20. That no person shall be attainted of treason by the general assembly; and that no conviction shall work corruption of blood, or forfeiture of estate.

§ 21. That no person shall be imprisoned for debt.

Nelson v. State, 46 Ala., 186; Morgan v. State, 47 Ala., 34; Caldwell v. State, 55 Ala., 133; Ex parte John Hardy, 68 Ala., 303; Lee v. State, 75 Ala., 29; State v. Leach, 75 Ala., 36.

§ 22. That no power of suspending laws shall be exercised, except by the general assembly.

§ 23. That no *ex post facto* law, or any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities, shall be passed by the general assembly.

No ex post facto law shall be passed by the general assembly.—Aldridge v. T. C. & D. R. R. Co., 2 Stew. & Port., 199; Elliott v. Mayfield, 4 Ala., 417; Holman v. Bank of Norfolk, 12 Ala., 369; Eliza v. State, 39 Ala., 693; Aaron v. State, Ib., 684; Witherby v. State, Ib., 702; Ferdi-

nand v. State, Ib., 706; Turner v. State, 40 Ala., 21; Hart v. State, Ib., 32; Miles v. State, Ib., 39; Moore v. State, Ib., 49; Miller v. State, Ib., 54; Stephen v. State, Ib., 67; Walthall v. Walthall, 42 Ala., 450; Caldwell v. State, 55 Ala., 133; Payne v. State, 60 Ala., 80; Goodlett v. Kelly, 74 Ala., 213; Washington v. State, 75 Ala., 582. **Nor any law impairing the obligation of contracts.**—Wheat v. State, Minor, 199; State v. Tombeckbee Bank, 2 Stew., 30; Anonymous, Ib., 228; Dale v. Governor, 3 Stew., 387; Aldridge v. Tuscumbia R. R. Co., 2 Stew. & Port., 199; Bloodgood v. Cammack, 5 Stew. & Port, 276; Trustees, etc., v. Winston, Ib., 17; Dyer v. Tuskaloosa Bridge Co., 2 Port., 297; Rathbone v. Bradford, 1 Ala., 312; Givens v. Western Bank, 2 Ala., 397; Bartlett v. Lang, Ib., 401; Iverson v. Shorter, 9 Ala., 713; Paschal v. Whitsett, 11 Ala., 472; Holman v. Bank, 12 Ala., 369; Trustees v. Walden, 15 Ala., 655; Benford v. Gibson, Ib., 523; Walker v. Chapman, 22 Ala., 116; Beck, Adm'r, v. Burnett, Ib., 822; Jemison v. P. & M. Bank, 23 Ala., 168; Mays, Adm'r, v. Williams, 27 Ala., 267; Mobile & Ohio R. R. Co. v. State, 29 Ala., 573; Coosa River S. Co. v. Barclay, 30 Ala., 120; Powell v. Sammons, 31 Ala., 552; Bugbee v. Howard, 32 Ala., 713; Curry v. Landers, 35 Ala., 280; Tennessee & Coosa R. R. Co. v. Moore, 36 Ala., 371; Ex parte N. E. & S. W. Ala. R. R. Co., 37 Ala., 679; Ala. Life Ins. Co. v. Boykin, 38 Ala., 510; Warfield v. Ravesies, Ib., 518; Ala & Fla. R. R. Co. v. Kenney, 39 Ala., 307; Blann v. State, Ib., 353; Ex parte Pollard, 40 Ala., 77; Page v. Matthews, Ib., 547; Hudspeth v. Davis, 41 Ala., 389; Scheible v. Bacho, Ib., 423; Tarleton v. Southern Bank, Ib., 722; Kirtland v. Molton, Ib., 548; Weaver v. Lapsley, 43 Ala., 224; Ashurst v. Phillips, Ib., 158; Herbert v. Easton, Ib., 547; Hale v. Huston, 44 Ala., 134; Ex parte Norton, Ib., 177; Roach, Adm'r, v. Gunter, Ib., 209; Ex parte Sims, Ex'r, Ib., 248; Curry v. Reynolds, Ib., 349; Mobile School Commissioners v. Putnam, Ib., 506; Martin v. Hewitt, Ib., 418; Fitzpatrick, Ex'r, v. Hearne, Ib., 171; Perkins v. Corbin, 45 Ala., 103; Broadbent v. Tuskaloosa S. & A. Asso'n, Ib., 170; Ala. & Fla. R. R. Co. v. Burkett, 46 Ala., 569; Medical College v. Muldon, Ib., 603; Wharton, Ex'r, v. Cunningham, Ib., 590; Boyd v. State, Ib., 329; Mobile & Girard R. R. Co. v. Peebles, 47 Ala., 317; Micou v. Tallassee Bridge Co., Ib., 652; Commissioners v. Rather, 48 Ala., 433; Horst v. Moses, Ib., 129; Todd v. Neal, 49 Ala., 266; Ex parte Buckley, 53 Ala., 42; Wilson v. Brown, 58 Ala., 62; Nelson v. McCrary, 60 Ala., 301; Mobile & Montgomery R. R. Co. v. Steiner, 61 Ala., 559; State v. Cobb, 64 Ala., 127; Steele v. Steele, Ib., 438; Fearn v. Ward, Adm'r, 65 Ala., 33; Smith v. Cockrell, 66 Ala., 64; Powell v. State, 69 Ala., 10; Edwards v. Williamson, 70 Ala., 145; Peevey v. Cabaniss, Ib., 253; Slaughter v. Mobile County, 73 Ala., 134; Goodlett v. Kelly, 74 Ala., 213; Mobile & Spring Hill R R. Co. v. Kennerly, Ib., 566; Dunlap v. State, 76 Ala., 460; Bell v. Hall, Ib., 546; Amy & Co. v. Selma, 77 Ala., 103. **Nor any law making any irrevocable grants of special privileges or immunities.**—Daughdrill v. Ala. Life Ins. Co., 31 Ala., 91; Sadler v. Langham, 34 Ala., 311; Clark v. Mobile School Commissioners, 36 Ala., 621.

§ 24. That the exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as individuals. But private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; *Provided, however,* That the general assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; *And provided,* That the right of eminent domain shall not be so construed as to allow taxation or forced subscriptions for the benefit of railroads or any other kind of corporations other than municipal, or for the benefit of any individual or association.

Aldridge v. Tuscumbia R. R. Co., 2 Stew. & Port., 199; Davis v. Tuscumbia R. R. Co., 4 Stew. & Port., 421; Dyer v. Tuskaloosa Bridge Co., 2 Port., 296; Burden v. Stein, 27 Ala., 104; Powell v. Sammons, 31 Ala., 552; Sadler v. Langham, 34 Ala., 311; Commissioners v. Bowie, Ib., 461; Gibbons v. M. & G. N. R.R. Co., 36 Ala., 410; Ala. & Fla. R. R. Co. v. Kenney, 39 Ala., 307. Mayor v. Dargan, 45 Ala., 310; Commissioners v. State, Ib., 399; Ex parte Selma & Gulf R. R. Co., Ib., 696; Ala. & Fla. R. R. Co. v. Burkett, 46 Ala .569; N. O., M. & T. R. R. Co. v. S. & A. T. Co., 53 Ala., 211; Bottoms v. Brewer, 54 Ala., 290; N. O. & S. R. R. Co. v. Jones, 68 Ala., 48; Jones v. N. O. & S. R. R. Co., 70 Ala., 227; Montgomery Southern R'y Co. v. Sayre, 72 Ala., 443.

§ 25. That all navigable waters shall remain forever public highways, free to the citizens of the State, and of the United States, without tax, impost, or toll; and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use

of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be expressly authorized by law.

§ 26. That the citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the power of government for redress of grievances, or other purposes, by petition, address, or remonstrance.

§ 27. That every citizen has a right to bear arms in defense of himself and the State.

State v. Reid, 1 Ala., 612.

§ 28. That no standing army shall be kept up without the consent of the general assembly; and, in that case, no appropriation for its support shall be made for a longer term than one year; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

§ 29. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

§ 30. That no title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State; and that no office shall be created, the appointment to which shall be for a longer time than during good behavior.

Horst v. Moses, 48 Ala., 129.

§ 31. That immigration shall be encouraged; emigration shall not be prohibited; and that no citizen shall be exiled.

Joseph v. Randolph, 71 Ala., 499.

§ 32. That temporary absence from the State shall not cause a forfeiture of residence once obtained.

§ 33. That no form of slavery shall exist in this State; and there shall be no involuntary servitude, otherwise than for the punishment of crime, of which the party shall have been duly convicted.

§ 34. The right of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult, or other improper conduct.

§ 35. The people of this State accept as final the established fact, that from the Federal Union there can be no secession of any State.

§ 36. Foreigners who are, or may hereafter become, *bona fide* residents of this State shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens.

§ 37. That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property; and when the government assumes other functions, it is usurpation and oppression.

South & North R. R. Co. v. Morris, 65 Ala., 193; Mangan v. State, 76 Ala., 60.

§ 38. No educational or property qualification for suffrage or office, nor any restraint upon the same on account of race, color, or previous condition of servitude shall be made by law.

§ 39. That this enumeration of certain rights shall not impair or deny others retained by the people.

Ex parte Dorsey, 7 Port, 293.

ARTICLE II.

STATE AND COUNTY BOUNDARIES.

§ 1. The boundaries of this State are established and declared to be as follows, that is to say: Beginning at the point where the thirty-first de-

gree of north latitude crosses the Perdido river; thence east, to the western boundary line of the State of Georgia; thence along said line to the southern boundary line of the State of Tennessee; thence west, along the southern boundary line of the State of Tennessee, crossing the Tennessee river, and on to the second intersection of said river by said line; thence up said river to the mouth of Big Bear creek; thence by a direct line to the northwest corner of Washington county, in this State, as originally formed; thence southerly along the line of the State of Mississippi to the Gulf of Mexico; thence eastwardly, including all islands within six leagues of the shore, to the Perdido river; thence up the said river to the beginning.

§ 2. The boundaries of the several counties of this State, as heretofore established by law, are hereby ratified and confirmed. The general assembly may, by a vote of two-thirds of both houses thereof, arrange and designate boundaries for the several counties of this State, which boundaries shall not be altered, except by a like vote; but no new counties shall be hereafter formed of less extent than six hundred square miles; and no existing county shall be reduced to less extent than six hundred square miles; and no new county shall be formed which does not contain a sufficient number of inhabitants to entitle it to one representative, under the ratio of representation existing at the time of its formation, and leave the county or counties from which it is taken with the required number of inhabitants entitling such county or counties to separate representation.

ARTICLE III.

DISTRIBUTION OF POWERS OF GOVERNMENT.

§ 1. The powers of the Government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Holman v. Bank, 12 Ala., 369; Hardy v. Bank, 15 Ala., 722; Stein v. Mayor, 24 Ala., 591; Haley v. Clark, 26 Ala., 439; Mobile & Ohio R. R. Co. v. State, 29 Ala., 573; Sadler v. Langham, 34 Ala., 322; T. & C. R R. Co. v. Moore, 36 Ala., 371; Ala Life Ins. Co. v. Boykin. 38 Ala., 513; Ingram v. State, 39 Ala., 250; Ex parte Echols, Ib., 698; Coltart v. Allen, 40 Ala., 155; Carleton v. Goodwin, 41 Ala., 153; Sanders v. Cabaniss, 43 Ala., 173; Weaver v. Lapsley, Ib., 224; Ex parte Norton, 44 Ala., 177; Ex parte Selma & Gulf R. R. Co., 45 Ala., 696; Mobile & Girard R. R. Co. v. Peebles, 47 Ala., 317; Stoudenmire v. Brown, 48 Ala., 699; Ex parte Screws. 49 Ala., 57; Chappell v. Doe, Ib., 153; Scott v. Strobach, Ib., 477; Wright v. Ware, 50 Ala., 549; Tallassee Mfg. Co. v Glenn, Ib., 489; Ex parte Hickey, 52 Ala.. 228; Todd v. Flournoy, 56 Ala., 99; Watson v. Oates, 58 Ala., 647; Tindal v. Drake, 60 Ala., 170; State v. Cobb, 64 Ala., 127; Bruce v. Bradshaw, 69 Ala., 360; Peevey v. Cabaniss, 70 Ala., 253; Munford v. Pearce, Ib., 452; Central A. & M. Asso'n v. Ala. Gold Life Ins. Co., Ib., 120.

§ 2. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

See decisions cited under section 1, supra.

ARTICLE IV.

LEGISLATIVE DEPARTMENT.

§ 1. The legislative power of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives.

Power unlimited, except in so far as it is restrained by the State or Federal Constitution.—Ex parte Dorsey, 7 Port., 293; State v. Reid, 1 Ala., 612, Ex parte Pickett, 24 Ala., 96; Stein v. Mayor, Ib., 591; Noles v State, 26 Ala., 31; Dorman v. State, 34 Ala., 216; Ingram v. State, 39 Ala., 249; Ala. & Fla. R. R. Co. v. Burkett, 42 Ala., 83; Gunter v. Dale County, 44 Ala., 639;

Ex parte Selma & Gulf R. R. Co., 45 Ala., 696; Wright v. Ware, 50 Ala., 555; Board of Revenue v. Barber, 53 Ala., 589; Irwin v. Mayor, 57 Ala., 6; Harrison v. Gordy, Ib., 49; Williams v. State, 61 Ala., 33; Davis v. State, 68 Ala., 58; Central A. & M. Asso'n v. Ala. Gold Life Ins. Co., 70 Ala., 120; Mangan v. State, 76 Ala., 60; Moog v. Randolph, 77 Ala., 597. **Delegation of powers to municipal corporations.**—Mayor v. Yuille, 3 Ala., 137; Marion v. Chandler, 6 Ala., 899; Estabrook v. State, Ib., 653; Mayor v. Rouse, 8 Ala., 515; Battle v. Mobile, 9 Ala., 234; Carroll v. Mayor, 12 Ala., 173; Mayor v. Allaire, 14 Ala., 400; Stein v. Mayor, 24 Ala., 591; Mayor v. Winter, 29 Ala., 651; Gibbons v. M. & G. N. R. R. Co., 36 Ala., 437; Osborne v. Mayor, 44 Ala., 493; Ex parte Selma & Gulf R. R. Co., 45 Ala., 696; Mobile & Girard R. R. Co. v. Peebles, 47 Ala., 317; Goldthwaite v. City Council, 50 Ala., 486; City Council v. Shoemaker, 51 Ala., 114; Moses v. Mayor, 52 Ala., 198; Dillard v. Webb, 55 Ala., 468; Ex parte City Council, 64 Ala., 463; Van Hook v. City of Selma, 70 Ala., 361. **Power to bind the State by contract.**—Tenn. & Coosa R. R. Co. v. Moore, 36 Ala., 371. **Police power.**—Lodano v. State, 25 Ala., 64; Dorman v. State, 34 Ala., 216; Molett v. State, 33 Ala., 408; Ingram v. State, 39 Ala., 247; Harrison v. Gordy, 57 Ala., 49; Joseph v. Randolph, 71 Ala., 499; Mangan v. State, 76 Ala., 60. **Power to pass special laws, applicable to one or more designated counties or localities.** Dorman v. State, 34 Ala., 216; Board of Revenue v. Barber, 53 Ala., 589; Davis v. State, 68 Ala., 58; Mangan v. State, 76 Ala., 60; Stein v. Leeper, 78 Ala., 517. **Power to pass special laws authorizing sales of property, transfer of administration of estates, etc.**—Holman v. Bank, 12 Ala., 269; Coltart v. Allen, 40 Ala., 155; Chappell v. Doe, 49 Ala., 153; Wright v. Ware, 50 Ala., 549; Ex parte Hickey, 52 Ala., 228; Van Hoose v. Bush, 54 Ala., 342; Todd v. Flournoy, 56 Ala., 99; Watson v. Oates, 58 Ala., 647; Tindall v. Drake, 60 Ala., 170; Bruce v. Bradshaw, 69 Ala., 360; Munford v. Pearce, 70 Ala., 452; **To require license of lawyer.**—Cousins v. State, 50 Ala., 113. **To provide for removal of court-house.**—Ex parte Hill, 40 Ala., 121; Clarke v. Jack, 60 Ala., 271. **To authorize grant of new trials.**—Ex parte Norton, 44 Ala., 177. **To dispense with formalities prescribed by incorporation laws.**—Central A. & M. Asso'n v. Ala. Gold Life Ins. Co., 70 Ala., 120. **To provide for punishment of offense partly perpetrated without the State.**—Green v. State, 66 Ala., 40. **Legislative power cannot be delegated.**—Clark v. Mobile, 67 Ala., 217.

§ 2. The style of the laws of this State shall be: "Be it enacted by the General Assembly of Alabama." Each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length.

Style of laws.—Dew v. Cunningham, 28 Ala., 466; Hoover v. State, 59 Ala., 57; Bales v. State, 63 Ala., 30. **Each law shall contain but one subject, which shall be clearly expressed in its title, etc.**—Miles v. State, 40 Ala., 39; Ex parte Pollard, Ib., 77; Tuskaloosa Bridge Co. v. Olmstead, 41 Ala., 9; Weaver v. Lapsley, 43 Ala., 224; Gunter v. Dale County, 44 Ala., 639; Martin v. Hewitt, Ib., 418; Ex parte Selma & Gulf R. R. Co., 45 Ala., 696; Farley v. Dowe, Ib., 324; Ex parte Upshaw, Ib., 234; Falconer v. Robinson, 46 Ala., 340; De Kalb County v. Smith, 47 Ala., 407; Lockhart v. Troy, 48 Ala., 579; Horst v. Moses, Ib., 129; Walker v. State, 49 Ala., 329; Lowndes County v. Hunter, Ib., 507; Tallassee Mfg. Co. v. Glenn, 50 Ala., 489; State v. Price, Ib., 568; Giles v. State, 52 Ala., 29; Moses v. Mayor, Ib., 198; Ex parte Hickey, Ib., 228; Key v. Jones, Adm'r, Ib., 238; Ex parte Buckley, 53 Ala., 42; Board of Revenue v. Barber, Ib., 589; Boyd v. State, Ib., 601; State v. Buckley, 54 Ala., 599; Dillard v. Webb, 55 Ala., 468; Smith v. State, Ib., 1; Adler v. State, Ib., 16; Watson v. State, Ib., 158; Evans v. M. & C. R. R. Co., 56 Ala., 246; Dane v. McArthur, 57 Ala., 448; Rogers v. Torbut, 58 Ala., 523; Hoover v. State, 59 Ala., 57; Walker v. Griffith, 60 Ala., 361; Ex parte Moore, 62 Ala., 471; Bales v. State, 63 Ala., 30; Block v. State, 66 Ala., 493; Carson v. State, 69 Ala., 235; Montgomery Mutual B. & L. Asso'n v. Robinson, Ib., 413; Ballentyne v. Wickersham, 75 Ala., 533; Stein v. Leeper, 78 Ala., 517; Abernathy v. State, Ib., 411; Donnelly v. State, Ib., 453; Dunbar v. Frazer, Ib., 538. **No law shall be revived, etc.**—Rogers v. Torbut, 58 Ala., 523.

§ 3. Senators and representatives shall be elected by the qualified electors on the first Monday in August, eighteen hundred and seventy-six, and one-half of the senators and all the representatives shall be elected every two years thereafter, unless the general assembly shall change the time of holding elections. The terms of the office of the senators shall be four years and that of the representatives two years, commencing on the day after the general election, except as otherwise provided in this Constitution.

§ 4. Senators shall be at least twenty-seven years of age, and representatives twenty-one years of age; they shall have been citizens and inhabitants of this State for three years, and inhabitants of their respective counties or districts one year next before their election, if such county or district shall have been so long established, but if not, then of the county

or district from which the same shall have been taken; and they shall reside in their respective counties or districts during their terms of service.

§ 5. The general assembly shall meet biennially, at the capitol, in the senate chamber and in the hall of the house of representatives (except in cases of destruction of the capitol, or epidemics, when the governor may convene them at such place in the State as he may deem best), on the day specified in this Constitution, or on such other day as may be prescribed by law, and shall not remain in session longer than sixty days at the first session held under this Constitution, nor longer than fifty days at any subsequent session.

Duration of session.—Moog v. Randolph, 77 Ala., 597; Sayre v. Pollard, Ib., 608.

§ 6. The pay of the members of the general assembly shall be four dollars per day, and ten cents per mile in going to and returning from the seat of government, to be computed by the nearest usual route traveled.

§ 7. The general assembly shall consist of not more than thirty-three senators, and not more than one hundred members of the house of representatives, to be apportioned among the several districts and counties as prescribed in this Constitution.

§ 8. The senate, at the beginning of each regular session, and at such other times as may be necessary, shall elect one of its members president thereof, and the house of representatives, at the beginning of each regular session, shall elect one of its members as speaker, and the president of the senate and the speaker of the house of representatives shall hold their offices respectively until their successors are elected and qualified. Each house shall choose its own officers, and shall judge of the election, returns and qualifications of its members.

§ 9. At the general election in the year eighteen hundred and seventy-six, senators shall be elected in the even-numbered districts to serve for two years, and in the odd-numbered districts to serve for four years, so that hereafter one-half the senators may be chosen biennially. Members of the house of representatives shall be elected at the general election every second year. The time of service of senators and representatives shall begin on the day after their election, except the terms of those elected in the year eighteen hundred and seventy-six, which shall not begin until the term of the present members shall have expired. Whenever a vacancy shall occur in either house, the governor for the time being shall issue a writ of election to fill such vacancy for the remainder of the term.

§ 10. A majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner, and under such penalties, as each house may provide.

§ 11. Each house shall have power to determine the rules of its proceedings, and to punish its members, or other persons, for contempt or disorderly behavior in its presence; to enforce obedience to its process; to protect its members against violence, or offers of bribes or corrupt solicitation; and, with the concurrence of two-thirds of either house, to expel a member, but not a second time for the same cause; and shall have all the powers necessary for the legislature of a free State.

§ 12. A member of either house expelled for corruption shall not thereafter be eligible to either house, and punishment for contempt or disorderly behavior shall not bar an indictment for the same offense.

§ 13. Each house shall keep a journal of its proceedings, and cause the same to be published immediately after its adjournment, excepting such parts as, in its judgment, may require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-tenth of the members present, be entered on the journals. Any member

of either house shall have liberty to dissent from, or protest against, any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered on the journals.

What journal should show.—Moody v. State, 48 Ala., 115; State v. Buckley, 54 Ala., 599; Harrison v. Gordy, 57 Ala., 49; Perry County v. Railroad Co, 58 Ala., 546; Walker v. Griffith, 60 Ala., 361; Clarke v. Jack, 60 Ala., 271; McKennie v. Gorman, 68 Ala., 442; Stein v. Leeper, 78 Ala., 517.

§ 14. Members of the general assembly shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

§ 15. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.

§ 16. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

§ 17. No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by election by the people.

State v. Porter, 1 Ala., 688.

§ 18. No person hereafter convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to the general assembly, or capable of holding any office of trust or profit in this State.

§ 19. No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose.

State v. Buckley, 54 Ala., 599; Harrison v. Gordy, 57 Ala., 49; Stein v. Leeper, 78 Ala., 517; Abernathy v. State, Ib., 411; Donnelly v. State, Ib., 453; Dunbar v. Frazer, Ib., 538.

§ 20. No bill shall become a law until it shall have been referred to a committee of each house and returned therefrom.

State v. Buckley, 54 Ala., 599.

§ 21. Every bill shall be read on three different days in each house; and no bill shall become a law unless, on its final passage, it be read at length, and the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journals, and a majority of each house be recorded thereon as voting in its favor, except as otherwise provided in this Constitution.

Dew v. Cunningham, 28 Ala., 466; Jones v. Hutchinson, 43 Ala., 721; Moody v. State, 48 Ala., 115; State v. Buckley, 54 Ala., 599; Hoover v. State, 59 Ala., 57; Walker v. Griffith, 60 Ala., 361; Bales v. State, 63 Ala., 30; Moog v. Randolph, 77 Ala., 597; Sayre v. Pollard, Ib., 608; Stein v. Leeper, 78 Ala., 517; Abernathy v. State, Ib., 411; Donnelly v. State, Ib., 453; Dunbar v. Frazer, Ib., 538.

§ 22. No amendment to bills by one house shall be concurred in by the other, except by a vote of a majority thereof, taken by yeas and nays, and the names of those voting for and against recorded upon the journals; and reports of committees of conference shall in like manner be adopted in each house.

State v. Buckley, 54 Ala., 599.

§ 23. No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this

State; nor shall the operation of any general law be suspended by the general assembly for the benefit of any individual, corporation, or association.

Clarke v. Jack, 60 Ala., 271; Ex parte City Council of Montgomery, 64 Ala., 463; McKennie v. Gorman, 68 Ala., 442; Munford v. Pearce, 70 Ala., 452.

§ 24. No local or special law shall be passed on a subject which cannot be provided for by a general law, unless notice of the intention to apply therefor shall have been published in the locality where the matter or things to be affected may be situated; which notice shall be at least twenty days prior to the introduction into the general assembly of such bill, and the evidence of such notice having been given shall be exhibited to the general assembly before such bill shall be passed; *Provided*, That the provisions of this Constitution, as to special or local laws, shall not apply to public or educational institutions of or in this State, nor to industrial, mining, immigration, or manufacturing corporations or interests, or corporations for constructing canals, or improving navigable rivers or harbors of this State.

Harrison v. Gordy, 57 Ala., 49; Walker v. Griffith, 60 Ala., 361; Clarke v. Jack, Ib., 271; McKennie v. Gorman, 68 Ala., 442.

§ 25. The general assembly shall pass general laws, under which local and private interests shall be provided for and protected.

§ 26. The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift-enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts, or parts of acts, heretofore passed by the general assembly of this State, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.

§ 27. The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the general assembly, after the titles have been publicly read immediately before signing, and the fact of signing shall be entered on the journal.

§ 28. The general assembly shall prescribe by law the number, duties, and compensation of the officers and employes of each house; and no payment shall be made from the state treasury, or be in any way authorized to any person, except to an acting officer or employe, elected or appointed in pursuance of law.

§ 29. No bill shall be passed giving any extra compensation to any public officer, servant or employe, agent or contractor, after the services shall have been rendered, or contract made; nor shall any officer of the State bind the State to the payment of any sum of money but by authority of law.

§ 30. All stationery, printing, paper, and fuel used in the legislative and other departments of government, shall be furnished, and the printing, binding, and distribution of laws, journals, department reports, and all other printing and binding, and repairing and furnishing the halls and rooms used for the meetings of the general assembly, and its committees, shall be performed under contract, to be given to the lowest responsible bidder below a maximum price, and under such regulations as shall be prescribed by law; no member or officer of any department of the government shall be in any way interested in such contracts, and all such contracts shall be subject to the approval of the governor, state auditor, and state treasurer.

§ 31. All bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments, as in other bills.

Perry County v. Railroad Co., 58 Ala., 546; Dunbar v. Frazer, 78 Ala., 538.

§ 32. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judi-

cial departments of the State, interest on the public debt, and for the public schools; all other appropriations shall be made by separate bills, each embracing but one subject.

§ 33. No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof; and a regular statement and account of receipts and expenditures of all public moneys shall be published annually, in such manner as may be by law directed.

Reynolds v. Blue, 47 Ala., 711; Smith v. Speed, 50 Ala., 276.

§ 34. No appropriation shall be made to any charitable or educational institution not under the absolute control of the State, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each house.

§ 35. No act of the general assembly shall authorize the investment of any trust fund by executors, administrators, guardians, and other trustees, in the bonds or stock of any private corporation; and any such acts now existing are avoided, saving investments heretofor made.

§ 36. The power to change the venue, in civil and criminal causes, is vested in the courts, to be exercised in such manner as shall be provided by law.

§ 37. When the general assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session.

§ 38. No state office shall be continued or created for the inspection or measuring of any merchandise, manufacture, or commodity; but any county or municipality may appoint such officers, when authorized by law.

§ 39. No act of the general assembly changing the seat of government of the State shall become a law until the same shall have been submitted to the qualified electors of the State at a general election, and approved by a majority of such electors voting on the same; and such act shall specify the proposed new location.

§ 40. A member of the general assembly, who shall corruptly solicit, demand, or receive, or consent to receive, directly or indirectly, for himself or for another, from any company, corporation, or person, any money, office, appointment, employment, reward, thing of value or enjoyment, or of personal advantage, or promise thereof, for his vote or official influence, or for withholding the same; or with an understanding, expressed or implied, that his vote or official action shall be in any way influenced thereby; or who shall solicit or demand any such money or other advantage, matter or thing aforesaid, for another, as the consideration of his vote or official influence, or for withholding the same; or shall give or withhold his vote or influence, in consideration of the payment or promise of such money, advantage, matter, or thing, to another, shall be guilty of bribery within the meaning of this Constitution, and shall incur the disabilities provided thereby for such offense, and such additional punishment as is, or shall be provided by law.

§ 41. Any person who shall, directly or indirectly, offer, give, or promise any money or thing of value, testimonial, privilege, or personal advantage, to any executive or judicial officer, or member of the general assembly, to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law.

§ 42. The offense of corrupt solicitation of members of the general assembly, or of public officers of this State, or of any municipal division thereof, and any occupation or practice of solicitation of such member or

officers, to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment.

§ 43. A member of the general assembly, who has a personal or private interest in any measure or bill, proposed or pending before the general assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon.

§ 44. In all elections by the general assembly, the members shall vote *viva voce*, and the votes shall be entered on the journals.

§ 45. It shall be the duty of the general assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by the parties who may choose that mode of adjustment.

§ 46. It shall be the duty of the general assembly, at its first session after the ratification of this Constitution, and within every subsequent period of ten years, to make provision by law for the revision, digesting and promulgation of the public statutes of this State of a general nature, both civil and criminal.

§ 47. The general assembly shall pass such penal laws as they may deem expedient to suppress the evil practice of dueling.

§ 48. It shall be the duty of the general assembly to regulate by law the cases in which deductions shall be made from the salaries of public officers, for neglect of duty in their official capacities, and the amount of such deductions.

§ 49. It shall be the duty of the general assembly to require the several counties of this State to make adequate provision for the maintenance of the poor.

§ 50. The general assembly shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this State.

§ 51. In the event of annexation of any foreign territory to this State, the general assembly shall enact laws extending to the inhabitants of the acquired territory all the rights and privileges which may be required by the terms of the acquisition, anything in this Constitution to the contrary notwithstanding.

§ 52. The general assembly shall not tax the property, real and personal, of the State, counties, or other municipal corporations, or cemeteries; nor lots in incorporated cities or towns, or within one mile of any city or town, to the extent of one acre, nor lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; nor such property, real or personal, to an extent not exceeding twenty-five thousand dollars in value, as may be used exclusively for agricultural or horticultural associations of a public character.

§ 53. The general assembly shall by law prescribe such rules and regulations as may be necessary to ascertain the value of personal and real property exempted from sale under legal process by this Constitution, and to secure the same to the claimant thereof as selected.

§ 54. The State shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the State be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation.

§ 55. The general assembly shall have no power to authorize any county, city, town, or other subdivision of this State, to lend its credit, or to grant public money or thing of value, in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds, or otherwise.

§ 56. There can be no law of this State impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the general assembly shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State.

Edwards v. Williamson, 70 Ala., 145.

ARTICLE V.

EXECUTIVE DEPARTMENT.

§ 1. The executive department shall consist of a governor, secretary of state, state treasurer, state auditor, attorney-general, and superintendent of education, and a sheriff for each county.

§ 2. The supreme executive power of this State shall be vested in a chief magistrate, who shall be styled "The Governor of the State of Alabama."

Tenn. & Coosa R. R. Co. v. Moore, 36 Ala., 371; State v. Cobb, 64 Ala , 127.

§ 3. The governor, secretary of state, state treasurer, state auditor, and attorney-general shall be elected by the qualified electors of this State, at the same time and places appointed for the election of members of the general assembly.

§ 4. The returns of every election for governor, secretary of state, state auditor, state treasurer, and attorney-general shall be sealed up and transmitted by the returning officers to the seat of government, directed to the speaker of the house of representatives, who shall, during the first week of the session to which said returns shall be made, open and publish them in the presence of both houses of the general assembly in joint convention. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more shall have an equal and the highest number of votes for the same office, the general assembly, by joint vote, without delay, shall choose one of said persons for said office. Contested elections for governor, secretary of state, state auditor, state treasurer, and attorney-general shall be determined by both houses of the general assembly in such manner as may be prescribed by law.

§ 5. The governor, secretary of state, state treasurer, state auditor, and attorney-general shall hold their respective offices for the term of two years from the time of their installation in office, and until their successors shall be elected and qualified.

§ 6. The governor shall be at least thirty years of age when elected, and shall have been a citizen of the United States ten years, and a resident citizen of this State at least seven years next before the day of his election.

§ 7. The governor, secretary of state, state treasurer, state auditor, and attorney-general shall reside at the seat of government of this State during the time they continue in office, except in case of epidemics; and they shall receive compensation for their services, which shall be fixed by law, and which shall not be increased or diminished during the term for which they shall have been elected.

§ 8. The governor shall take care that the laws be faithfully executed.

§ 9. The governor may require information in writing, under oath, from the officers of the executive department on any subject relating to the duties of their respective offices; and he may, at any time, require information in writing, under oath, from all officers and managers of State institutions, upon any subject relating to the condition, management, and expenses of their respective offices and institutions; and any such officer

or manager who makes a false report, shall be guilty of perjury, and punished accordingly.

§ 10. The governor may, by proclamation, on extraordinary occasions, convene the general assembly at the seat of government, or at a different place, if, since their last adjournment, that shall have become dangerous from an enemy, or from infectious or contagious diseases; and he shall state specifically in such proclamation each matter concerning which the action of that body is deemed necessary.

§ 11. The governor shall, from time to time, give to the general assembly information of the state of the government, and recommend to their consideration such measures as he may deem expedient; and, at the commencement of each session of the general assembly, and at the close of his term of office, give information, by written message, of the condition of the State; and he shall account to the general assembly, as may be prescribed by law, for all moneys received and paid out by him, from any funds subject to his order, with the vouchers therefor; and he shall, at the commencement of each regular session, present to the general assembly estimates of the amount of money required to be raised by taxation for all purposes.

§ 12. The governor shall have power to remit fines and forfeitures, under such rules and regulations as may be prescribed by law, and after conviction, to grant reprieves, commutation of sentence, and pardons (except in cases of treason and impeachment); but pardons, in cases of murder, arson, burglary, rape, assault with intent to commit rape, perjury, forgery, bribery, and larceny, shall not relieve from civil and political disability, unless specifically expressed in the pardon. Upon conviction of treason, the governor may suspend the execution of the sentence, and report the same to the general assembly at the next regular session, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant further reprieve. He shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, with his reasons therefor, stating the name and crime of the convict, the sentence, its date, and the date of the reprieve, commutation, or pardon.

Haley v. Clark, 26 Ala., 439; Mobile & Girard R. R. Co. v. Peebles, 47 Ala., 317.

§ 13. Every bill which shall have passed both houses of the general assembly, shall be presented to the governor; if he approve, he shall sign it, but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large upon the journals, and the house to which such bill shall be returned shall proceed to reconsider it; if, after such reconsideration, a majority of the whole number elected to that house shall vote for the passage of such bill, it shall be sent, with the objections, to the other house, by which it shall likewise be reconsidered; if approved by a majority of the whole number elected to that house, it shall become a law, but in such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journals of each house respectively. If any bill shall not be returned by the governor within five days, Sundays excepted, after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly, by their adjournment, prevent its return, in which case it shall not be a law. And every order, vote, or resolution, to which the concurrence of both houses may be necessary (except questions of adjournment, and of bringing on elections by the two houses, and of amending this Constitution), shall be presented to the governor; and, before the same shall take effect, be approved by him, or, being disapproved, shall be re-

passed by both houses according to the rules and limitations prescribed in the case of a bill.

Jones v. Hutchinson, 43 Ala., 721; Moody v. State, 48 Ala., 115; Moog v. Randolph, 77 Ala., 597; Sayre v. Pollard, Ib., 608; Stein v. Leeper, 78 Ala., 517; Abernathy v. State, Ib., 411.

§ 14. The governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of bill approved shall be the law, and the item or items of appropriations disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto; and he shall, in writing, state specifically the item or items he disapproves.

§ 15. In case of the impeachment of the governor, his removal from office, death, refusal to qualify, resignation, absence from the State, or other disability, the president of the senate shall exercise all the power and authority appertaining to the office of governor, until the time appointed for the election of governor shall arrive, or until the governor who is absent, or impeached, shall return or be acquitted, or other disability be removed; and if during such vacancy in the office of governor the president of the senate shall be impeached, removed from office, refuse to qualify, die, resign, be absent from the State, or be under any other disability, the speaker of the house of representatives shall, in like manner, administer the government. If the governor shall be absent from the State over twenty days, the secretary of state shall notify the president of the senate, who shall enter upon the duties of governor; and if the governor and president of the senate shall both be absent from the State over twenty days, the secretary of state shall notify the speaker of the house of representatives, and in such case he shall enter upon and discharge the duties of governor until the return of the governor, or president of the senate.

§ 16. The president of the senate and speaker of the house of representatives shall, during the time they respectively administer the government, receive the same compensation which the governor would have received if he had been employed in the duties of his office; *Provided*, That if the general assembly shall be in session during such absence, they, or either of them, shall receive no compensation as members of the general assembly while acting as governor.

§ 17. No person shall, at one and the same time, hold the office of governor of this State and any other office, civil or military, either under this State, the United States, or any other State or government, except as otherwise provided in this Constitution.

§ 18. The governor shall be commander-in-chief of the militia and volunteer forces of this State, except when they shall be called into the service of the United States, and he may call out the same to execute the laws, suppress insurrection, and repel invasion; but he need not command in person unless directed to do so by a resolution of the general assembly; and when acting in the service of the United States he shall appoint his staff, and the general assembly shall fix his rank.

§ 19. No person shall be eligible to the office of secretary of state, state treasurer, state auditor, or attorney-general, unless he shall have been a citizen of the United States at least seven years, and shall have resided in this State at least five years next preceding his election, and shall be at least twenty-five years old when elected.

§ 20. There shall be a great seal of the State, which shall be used officially by the governor; and the seal now in use shall continue to be used until another shall have been adopted by the general assembly. The said seal shall be called the "Great Seal of the State of Alabama."

§ 21. The secretary of state shall be the custodian of the seal of the State,

and shall authenticate therewith all official acts of the governor, his approval of laws and resolutions excepted. He shall keep a register of the official acts of the governor, and when necessary, shall attest them, and lay copies of the same, together with copies of all papers relative thereto, before either house of the general assembly, whenever required to do so, and shall perform such other duties as may be prescribed by law.

§ 22. All grants and commissions shall be issued in the name and by the authority of the State of Alabama, sealed with the great seal, and signed by the governor, and countersigned by the secretary of state.

§ 23. Should the office of secretary of state, state treasurer, state auditor, attorney-general, or superintendent of education become vacant, for any of the causes specified in section fifteen of this article, the governor shall fill the vacancy until the disability is removed, or a successor elected and qualified.

§ 24. The state treasurer, state auditor, and attorney-general shall perform such duties as may be prescribed by law. The state treasurer and state auditor shall, every year, at a time the general assembly may fix, make a full and complete report to the governor, showing all receipts and disbursements of revenue of every character, all claims audited and paid by the State, by items, and all taxes and revenue collected and paid into the treasury, and from what sources; and they shall make reports oftener on any matter pertaining to their office, if required by the governor or the general assembly.

§ 25. The state auditor, state treasurer, and secretary of state shall not, after the expiration of the terms of those now in office, receive to their use any fees, costs, perquisites of office, or compensation, other than their salaries as prescribed by law; and all fees that may be payable by law, for any service performed by either of such officers, shall be paid in advance into the state treasury.

§ 26. A sheriff shall be elected in each county, by the qualified electors thereof, who shall hold his office for the term of four years, unless sooner removed, and shall be ineligible to such office as his own successor; *Provided*, That sheriffs elected on the first Monday in August, 1877, or at such other time as may be prescribed by law for the election in that year, shall hold their offices for the term of three years, and until their successors shall be elected and qualified. In the year 1880, at the general election for members to the general assembly, sheriffs shall be elected for four years, as herein provided. Vacancies in the office of sheriff shall be filled by the governor, as in other cases; and the person appointed shall continue in office until the next general election in the county for sheriff, as provided by law.

ARTICLE VI.

JUDICIAL DEPARTMENT.

§ 1. The judicial power of the State shall be vested in the senate, sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish, and such persons as may be by law invested with powers of a judicial nature.

Nugent v. State, 18 Ala., 521; Ala. & Fla. R. R. Co. v. Burkett 42 Ala., 83; Perkins v. Corbin, 45 Ala., 103; Sanders v. State, 55 Ala., 42; Connelly v. State, 60 Ala , 89; Williams v. State, 61 Ala., 33; Davis v. State, 68 Ala., 58; Moore v. State, Ib., 360.

§ 2. Except in cases otherwise directed in the Constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive

with the State, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law; *Provided*, That said court shall have power to issue writs of injunction, *habeas corpus*, *quo warranto*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions.

Jurisdiction.—State v. Flinn, Minor 8; Johnston v. Atwood, 2 Stew., 225; Bell v. Payne, Ib., 413. **Power to issue writs, etc.**—State v. Paul, 5 Stew. & Port., 40; State v. Williams, 1 Ala., 342; State v. Porter, Ib., 688; Ex parte Mansony, Ib., 98; Ex parte Tarleton, 2 Ala., 35; Ex parte Chaney, 8 Ala., 427; Nugent v. State, 18 Ala., 521; Ex parte Pickett, 24 Ala., 91; Ex parte City Council, Ib., 98; Ex parte Henry, Ib., 638; Ex parte Elston, 25 Ala., 72; Ex parte Greene, 29 Ala., 52; Ex parte Russell, Ib., 717; Ex parte Echols, 39 Ala., 698; Ex parte Floyd, 40 Ala., 116; Ex parte Henderson, 43 Ala., 392; Ex parte Bibb, 44 Ala., 140; Ex parte Candee, 48 Ala., 386; Ex parte Roundtree, 51 Ala., 42.

§ 3. The supreme court shall be held at the seat of government, but if that shall have become dangerous from any cause, it may adjourn to a different place.

§ 4. The State shall be divided by the general assembly into convenient circuits, not to exceed eight in number, unless increased by a vote of two-thirds of the members of each house of the general assembly, and no circuit shall contain less than three nor more than twelve counties; and for each circuit there shall be chosen a judge, who shall, for one year next preceding his election, and during his continuance in office, reside in the circuit for which he is elected.

§ 5. The circuit court shall have original jurisdiction in all matters, civil and criminal, within the State, not otherwise excepted in the Constitution; but in civil cases only when the matter or sum in controversy exceeds fifty dollars.

Hogan v. Odam, 3 Stew., 58; Huggins v. Ball, 19 Ala., 587; Cahuzac v. Samini, 29 Ala., 288; McClure v. Lay, 30 Ala., 208; Nowlin v. McCalley, 31 Ala., 678; Carew v. Lillienthall, 50 Ala., 44; Dunbar v. Frazer, 78 Ala., 529.

§ 6. A circuit court shall be held in each county in the State at least twice in every year, and the judges of the several circuits may hold courts for each other, when they deem it expedient, and shall do so when directed by law; *Provided*, That the judges of the several circuit courts shall have power to issue writs of injunction returnable into courts of chancery.

§ 7. The general assembly shall have power to establish a court or courts of chancery, with original and appellate jurisdiction. The State shall be divided by the general assembly into convenient chancery divisions, not exceeding three in number, unless an increase shall be made by a vote of two-thirds of each house of the general assembly, taken by yeas and nays and entered upon the journals; and the divisions shall be divided into districts; and for each division there shall be a chancellor, who shall, at the time of his election or appointment, and during his continuance in office, reside in the division for which he shall have been elected or appointed.

Nugent v. State, 18 Ala., 521.

§ 8. A chancery court shall be held in each district, at a place to be fixed by law, at least once in each year; and the chancellors may hold courts for each other, when they deem it necessary.

Fulmore v. Brady, 44 Ala., 218.

§ 9. The general assembly shall have power to establish in each county within the State a court of probate, with general jurisdiction for the granting of letters testamentary and of administration, and for orphans' business.

Ikelheimer v. Chapman, 32 Ala., 676; Coltart v. Allen, 40 Ala., 155; Balkum v. State, Ib., 671; Randolph v. Baldwin, 41 Ala., 360; Carswell v. Spencer, 44 Ala., 204; Wright v. Ware, 50 Ala., 549; Thompson v. Holt, 52 Ala., 491; N. O., M. & T. R. R. Co. v. S. & A. T. Co., 53 Ala., 211; Sims v. Waters, 65 Ala., 442; Steele v. Tutwiler, 68 Ala., 107; Malone v. Hill, Ib., 225; Moore v. State, Ib., 360.

§ 10. The judges of the supreme court, circuit courts, and chancellors shall, at stated times, receive for their services a compensation, which shall not be diminished during their official terms, but they shall receive no fees or perquisites, nor hold any office (except judicial offices) of profit or trust under this State or the United States, or any other power, during the term for which they have been elected.

Perkins v. Corbin, 45 Ala., 103; Ex parte Roundtree, 51 Ala., 42; Ex parte Amos, Ib., 57.

§ 11. The supreme court shall consist of one chief justice and such number of associate justices as may be prescribed by law.

§ 12. The chief justice and associate justices of the supreme court, judges of the circuit courts, probate courts, and chancellors shall be elected by the qualified electors of the State, circuits, counties, and chancery divisions, for which such courts may be established, at such times as may be prescribed by law.

Ex parte Roundtree, 51 Ala., 42; Ex parte Amos, Ib., 57; Thompson v. Holt, 52 Ala., 491.

§ 13. The judges of such inferior courts of law and equity as may be by law established, shall be elected or appointed in such mode as the general assembly may prescribe.

Balkum v. State, 40 Ala., 671; Randolph v. Baldwin. 41 Ala., 305; Perkins v. Corbin, 45 Ala., 103; Ex parte Roundtree, 51 Ala., 42; Moore v. State, 68 Ala., 360.

§ 14. The judges of the supreme court, circuit courts, and chancellors, and the judges of city courts shall have been citizens of the United States and of this State for five years next preceding their election or appointment, and shall be not less than twenty-five years of age, and learned in the law.

§ 15. The chief justice and associate justices of the supreme court, circuit judges, chancellors, and probate judges shall hold office for the term of six years, and until their successors are elected or appointed and qualified; and the right of such judges and chancellors to hold their offices for the full time hereby prescribed shall not be affected by any change hereafter made by law in any circuit, division, or county in the mode or time of election.

§ 16. The judges of the supreme court shall, by virtue of their offices, be conservators of the peace throughout the State; the judges of the circuit courts, within their respective circuits, and the judges of the inferior courts within their respective jurisdictions, shall, in like manner, be conservators of the peace.

§ 17. Vacancies in the office of any of the judges or chancellors of this State shall be filled by appointment by the governor; and such appointee shall hold his office for the unexpired term, and until his successor is elected or appointed and qualified.

§ 18. If in any case, civil or criminal, pending in any circuit, chancery, or city court in this State, the presiding judge or chancellor shall, for any legal cause, be incompetent to try, hear, or render judgment in such cause, the parties or their attorneys of record, if it be a civil case, or the solicitor or other prosecuting officer, and the defendant or defendants, if it be a criminal case, may agree upon some disinterested person practicing in the court and learned in the law, to act as special judge or chancellor, to sit as a court, and to hear, decide, and render judgment in the same manner and to the same effect as a judge of the circuit or city court, or chancellor sitting as a court might do in such case. If the case be a civil one, and the parties or their attorneys of record do not agree, or if the case be a criminal one, and the prosecuting officer and the defendant or defendants do not agree upon a special judge or chancellor, or if either party in a civil cause is not represented in court, the clerk of the circuit or city court,

or register in chancery, of the court in which said cause is pending, shall appoint the special judge or chancellor, who shall preside, try, and render judgment as in this section provided.

Payne v. State, 60 Ala., 80; Gill v. State, 61 Ala., 169.

§ 19. The general assembly shall have power to provide for the holding of circuit and chancery courts in this State, when the judges or chancellors thereof fail to attend regular terms.

§ 20. No judge of any court of record in this State shall practice law in any of the courts of this State or of the United States.

§ 21. Registers in chancery shall be appointed by the chancellors of the divisions, and shall hold office during the term of the chancellor making such appointment; and such registers shall receive as compensation for their services only such fees and commissions as may be specifically prescribed by law.

§ 22. A clerk of the supreme court shall be appointed by the judges thereof, and shall hold office during the term of the judges making the appointment; and clerks of such inferior courts as may be established by law shall be appointed by the judges thereof, and shall hold office during the term of the judge making such appointment.

§ 23. Clerks of the circuit court shall be elected by the qualified electors in each county for the term of six years. Vacancies in such office shall be filled by the governor for the unexpired term.

§ 24. The clerk of the supreme court and registers in chancery may be removed from office by the judges of the supreme court and chancellors respectively, for cause, to be entered at length upon the records of the court.

§ 25. A solicitor for each judicial circuit shall be elected by joint ballot of the general assembly, who shall be learned in the law, and who shall, at the time of his election, and during his continuance in office, reside in the circuit for which he is chosen, and whose term of office shall be for six years; *Provided*, That the general assembly, at the first session thereof after the ratification of this Constitution, shall, by joint ballot, elect a solicitor for each judicial circuit of the State, whose term of office shall begin on Tuesday after the first Monday in November, eighteen hundred and seventy-six, and continue for four years; *And provided*, That the general assembly may, when necessary, provide for the election or appointment of county solicitors.

§ 26. There shall be elected by the qualified electors of each precinct of the counties not exceeding two justices of the peace and one constable. Such justices shall have jurisdiction in all civil cases wherein the amount in controversy does not exceed one hundred dollars, except in cases of libel, slander, assault and battery, and ejectment. In all cases tried before such justices the right of appeal, without prepayment of costs, shall be secured by law; *Provided*, That the governor may appoint one notary public for each election precinct in counties, and one for each ward in cities of over five thousand inhabitants, who, in addition to the powers of notary, shall have and exercise the same jurisdiction as justices of the peace within the precincts and wards for which they are respectively appointed; *And provided*, That notaries public without such jurisdiction may be appointed. The term of office of such justices and notaries public shall be prescribed by law.

Jurisdiction generally.—Herrin v. Buckelew, 37 Ala., 585; Solomon v. Ross, 49 Ala., 198; Carew v. Lillienthall, 50 Ala., 44; Taylor v. Woods, 52 Ala., 474; Ex parte Brown, 63 Ala., 187; Carter v. Alford, 64 Ala., 236; Burns v. Henry, 67 Ala., 209. **In actions of forcible entry and unlawful detainer.**—Ward v. Lewis, 1 Stew., 26; Ex parte Webb, 58 Ala., 109; Webb v. Carlisle, 65 Ala., 313. **Right of appeal must be secured.**—Tims v. State, 26 Ala., 165; Ex parte Haughton, 38 Ala., 570. **Notaries with justice's jurisdiction.**—Carroll v. State, 58 Ala., 396;

Coleman v. State. 63 Ala., 93; Murphy v. State, 68 Ala., 31; Griffin v. Appleby, 69 Ala., 409; Vann v. Adams, 71 Ala., 475; Rice v. Watts, Ib., 593; Nordlinger v. Gordon, 72 Ala., 239.

§ 27. An attorney-general shall be elected by the qualified electors of the State at the same time and places of election of members of the general assembly, whose term of office shall be for two years, and until his successor is elected and qualified. After his election he shall reside at the seat of government, and shall be the law officer of the State, and shall perform such duties as may be required of him by law.

§ 28. The style of all process shall be "The State of Alabama," and all prosecutions shall be carried on in the name and by the authority of the same, and shall conclude, "Against the peace and dignity of the State."

ARTICLE VII.

IMPEACHMENTS.

§ 1. The governor, secretary of state, auditor, treasurer, attorney-general, superintendent of education, and judges of the supreme court may be removed from office for willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith, by the senate, sitting as a court for that purpose, under oath or affirmation, on articles or charges preferred by the house of representatives.

State v. Buckley, 54 Ala., 599.

§ 2. The chancellors, judges of the circuit courts, judges of the probate courts, solicitors of the circuits, and judges of the inferior courts, from which an appeal may be taken directly to the supreme court, may be removed from office for any of the causes specified in the preceding section, by the supreme court, under such regulations as may be prescribed by law.

State v. Buckley, 54 Ala., 599.

§ 3. The sheriffs, clerks of the circuit, city, or criminal courts, tax collectors, tax assessors, county treasurers, coroners, justices of the peace, notaries public, constables, and all other county officers, mayors, and intendants of incorporated cities and towns in this State, may be removed from office for any of the causes specified in section one of this article, by the circuit, city, or criminal court of the county in which such officers hold their office, under such regulations as may be prescribed by law; *Provided*, That the right of trial by jury and appeal in such cases be secured.

State v. Buckley, 54 Ala., 599.

§ 4. The penalties in cases arising under the three preceding sections shall not extend beyond removal from office, and disqualification from holding office under the authority of this State, for the term for which he was elected or appointed; but the accused shall be liable to indictment, trial, and punishment, as prescribed by law.

ARTICLE VIII.

SUFFRAGE AND ELECTIONS.

§ 1. Every male citizen of the United States, and every male person of foreign birth, who may have legally declared his intention to become a citizen of the United States before he offers to vote, who is twenty-one years old, or upwards, possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election by the people, except as hereinafter provided:

First.—He shall have resided in the State at least one year immediately preceding the election at which he offers to vote.

Second.—He shall have resided in the county for three months, and in the precinct or ward for thirty days immediately preceding the election at which he offers to vote; *Provided*, That the general assembly may prescribe a longer or shorter residence in any precinct in any county, or in any ward in any incorporated city or town, having a population of more than five thousand inhabitants, but in no case to exceed three months; *And provided*, That no soldier, sailor, or marine, in the military or naval service of the United States, shall acquire a residence by being stationed in this State.

§ 2. All elections by the people shall be by ballot, and all elections by persons in a representative capacity shall be *viva voce*.

§ 3. The following classes shall not be permitted to register, vote, or hold office:

First.—Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary.

Anderson v. State, 72 Ala., 187; Washington v. State, 75 Ala., 582.

Second.—Those who are idiots or insane.

§ 4. Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, or while going to or returning therefrom.

§ 5. The general assembly shall pass laws, not inconsistent with this Constitution, to regulate and govern elections in this State, and all such laws shall be uniform throughout the State. The general assembly may, when necessary, provide by law for the registration of electors throughout the State, or in any incorporated city or town thereof, and when it is so provided, no person shall vote at any election unless he shall have registered as required by law.

§ 6. It shall be the duty of the general assembly to pass adequate laws giving protection against the evils arising from the use of intoxicating liquors at all elections.

§ 7. Returns of elections for all civil officers who are to be commissioned by the governor, except secretary of state, state auditor, state treasurer and attorney-general, and for members of the general assembly, shall be made to the secretary of state.

ARTICLE IX.

REPRESENTATION.

§ 1. The whole number of senators shall be not less than one-fourth or more than one-third the whole number of representatives.

§ 2. The house of representatives shall consist of not more than one hundred members, who shall be apportioned by the general assembly among the several counties of the State, according to the number of inhabitants in them respectively, as ascertained by the decennial census of the United States for the year eighteen hundred and eighty; which apportionment, when made, shall not be subject to alteration until the first session of the general assembly after the next decennial census of the United States shall have been taken.

§ 3. It shall be the duty of the general assembly, at its first session after the taking of the decennial census of the United States in the year eighteen hundred and eighty, and after each subsequent decennial census, to fix by law the number of representatives, and apportion them among the several

counties of the State; *Provided*, That each county shall be entitled to at least one representative.

§ 4. It shall be the duty of the general assembly at its first session after the taking of the decennial census of the United States in the year eighteen hundred and eighty, and after each subsequent decennial census, to fix by law the number of senators, and to divide the State into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and which districts, when formed, shall not be changed until the next apportioning session of the general assembly after the next decennial census of the United States shall have been taken. No county shall be divided between two districts, and no district shall be made of two or more counties not contiguous to each other.

§ 5. Should the decennial census of the United States, from any cause, not be taken, or if, when taken, the same as to this State is not full and satisfactory, the general assembly shall have power, at its first session after the time shall have elapsed for the taking of said census, to provide for an enumeration of all the inhabitants of this State, and once in each ten years thereafter, upon which it shall be the duty of the general assembly to make the apportionment of representatives and senators as provided for in this article.

§ 6. Until the general assembly shall make an apportionment of representatives among the several counties, after the first decennial census of the United States, as herein provided, the counties of Autauga, Baldwin, Bibb, Blount, Calhoun, Chilton, Cherokee, Choctaw, Clark, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Dale, DeKalb, Elmore, Etowah, Escambia, Fayette, Franklin, Geneva, Henry, Lauderdale, Marion, Morgan, Monroe, Marshall, Randolph, Sanford, Shelby, St. Clair, Walker, Washington, and Winston shall each have one representative; the counties of Barbour, Bullock, Butler, Chambers, Greene, Hale, Jackson, Jefferson, Limestone, Lawrence, Lowndes, Lee, Macon, Marengo, Perry, Pickens, Pike, Russell, Sumter, Talladega, Tallapoosa, Tuskaloosa, and Wilcox shall have each two representatives; the county of Madison shall have three representatives; the counties of Dallas and Montgomery shall have, each, four representatives; and the county of Mobile shall have five representatives.

§ 7. Until the general assembly shall divide the State into senatorial districts, as herein provided, the senatorial districts shall be as follows: First district, Lauderdale and Limestone; second district, Colbert and Lawrence; third district, Morgan, Winston, and Blount; fourth district, Madison; fifth district, Marshall, Jackson, and DeKalb; sixth district, Cherokee, Etowah, and St. Clair; seventh district, Calhoun and Cleburne; eighth district, Talladega and Clay; ninth district, Randolph and Chambers; tenth district, Macon and Tallapoosa; eleventh district, Bibb and Tuskaloosa; twelfth district, Franklin, Marion, Fayette, and Sanford; thirteenth district, Walker, Jefferson, and Shelby; fourteenth district, Greene and Pickens; fifteenth district, Coosa, Elmore, and Chilton; sixteenth district, Lowndes and Autauga; seventeenth district, Butler and Conecuh; eighteenth district, Perry; nineteenth district, Choctaw, Clark, and Washington; twentieth district, Marengo; twenty-first district, Monroe, Escambia, and Baldwin; twenty-second district, Wilcox; twenty-third district, Henry, Coffee, Dale, and Geneva; twenty-fourth district, Barbour; twenty-fifth district, Pike, Crenshaw, and Covington; twenty-sixth district, Bullock; twenty-seventh district, Lee; twenty-eighth district, Montgomery; twenty-ninth district, Russell; thirtieth district, Dallas; thirty-

first district, Sumter; thirty-second district, Hale; thirty-third district, Mobile.

ARTICLE X.

EXEMPTED PROPERTY.

§ 1. The personal property of any resident of this State, to the value of one thousand dollars, to be selected by such resident, shall be exempted from sale on execution, or other process of any court, issued for the collection of any debt contracted since the thirteenth day of July, eighteen hundred and sixty-eight, or after the ratification of this Constitution.

Bray v. Laird, 44 Ala., 295; Webb v. Edwards, 46 Ala., 17; Giovanni v. First Nat. Bank, 55, Ala., 305; Schuessler v. Wilson, 56 Ala., 516; Ala. Conference v. Vaughan, 54 Ala., 443; Williamson v. Harris, 57 Ala., 40; Brown v. Leitch, 60 Ala., 313; Borden v. Bradshaw, 68 Ala., 362; Williams v. Bowden, 69 Ala., 433; Weis v. Levy, Ib., 209; McCrary v. Chase, 71 Ala., 540.

§ 2. Every homestead, not exceeding eighty acres, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any city, town, or village, or in lieu thereof, at the option of the owner, any lot in the city, town, or village, with the dwelling and appurtenances thereon, owned and occupied by any resident of this State, and not exceeding the value of two thousand dollars, shall be exempted from sale on execution, or any other process from a court, for any debt contracted since the thirteenth day of July, eighteen hundred and sixty-eight, or after the ratification of this Constitution. Such exemption, however, shall not extend to any mortgage lawfully obtained, but such mortgage or other alienation of such homestead, by the owner thereof, if a married man, shall not be valid without the voluntary signature and assent of the wife to the same.

Essentials to, and extent of homestead.—Pizzala v. Campbell, 46 Ala., 35; Weber v. Short, 55 Ala., 311 (overruling Pizzala v. Campbell, supra); Miller v. Marx, Ib., 322; McGuire v. Van Pelt, Ib., 344; Chambers v. McPhaul, Ib., 367; McConnaughy v. Baxter, Ib., 379; Bender v. Meyer, Ib., 576; David v. David, 56 Ala., 49; Dexter v. Strobach, Ib., 233; Watts v. Burnett, Ib., 340; Lyons v. Connor, 57 Ala., 181; Boyle v. Shulman, 59 Ala., 566; Preiss v. Campbell, Ib., 635; Nelson v. McCrary, 60 Ala., 301; Garner v. Bond, 61 Ala., 84; Weiner v. Sterling, Ib.; 98; Blum v. Carter, 63 Ala., 235; Farley v. Whitehead, Ib., 295; Stowe v. Lillie, Ib., 257, Watts v. Gordon, 65 Ala., 546; Talmadge v. Talmadge, 66 Ala., 199; Carlisle v. Godwin, 68 Ala. 137; Snedecor v. Freeman, 71 Ala., 140; Scaife v. Argill, 74 Ala., 473; Clark v. Spencer, 75 Ala., 49. **Meaning of "debts contracted."**—Meredith v. Holmes, 68 Ala., 190; Williams v. Bowden, 69 Ala., 433. **Alienation of homestead.**—Miller v. Marx, 55 Ala., 322; McGuire v. Van Pelt, Ib., 344; Coleman v. Smith, Ib., 368; Pettus v. McKinney, 56 Ala., 41; Lyons v. Connor, 57 Ala., 181; Garner v. Bond, 61 Ala., 84; Weiner v. Sterling, Ib., 98; Dooley v. Villalonga, Ib., 129; Cahall v. Citizens' M. B. Asso'n, Ib., 232; Forsyth v. Preer, 62 Ala., 443; Halso v. Seawright, 65 Ala., 431; Long v. Mostyn, Ib., 543; Jenkins v. Harrison, 66 Ala., 345; Slaughter v. McBride, 69 Ala., 510; Scott v. Simons, 70 Ala., 352; Snedecor v. Freeman, 71 Ala., 140; Butts v. Broughton, 72 Ala., 294; Hood v. Powell, 73 Ala., 171; Vancleave v. Wilson, Ib., 387; DeGraffenreid v. Clark, 75 Ala., 425; Alford v. Lehman, 76 Ala., 526; Watson v. Mancil, Ib., 600; Crim v. Nelms, 78 Ala., 604.

§ 3. The homestead of a family, after the death of the owner thereof, shall be exempt from the payment of any debts contracted since the thirteenth day of July, one thousand eight hundred and sixty-eight, or after the ratification of this Constitution, in all cases, during the minority of the children.

Weber v. Short, 55 Ala., 311; Miller v Marx, Ib., 322; Chambers v. McPhaul, Ib., 367; David v. David, 56 Ala., 49; Fellows v. Lewis, 65 Ala., 343; Ex parte Pearson, 76 Ala., 521; Englehardt v. Young, Ib., 534; Skinner v. Chapman, 78 Ala., 376.

§ 4. The provisions of section one and two of this article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises.

§ 5. If the owner of a homestead die, leaving a widow, but no children,

such homestead shall be exempt, and the rents and profits thereof shall enure to her benefit.

Pizzala v. Campbell, 46 Ala., 35; Weber v. Short, 55 Ala., 311; Miller v. Marx, Ib, 322; Chambers v. McPhaul, Ib., 367; Barber v. Williams, 74 Ala., 331.

§ 6. The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may afterwards be entitled by gift, grant, inheritance, or devise, shall be and remain the separate estate and property of such female, and shall not be liable for any debts, obligations, and engagements of her husband, and may be devised or bequeathed by her, the same as if she were a *femme sole*.

Bender v. Meyer & Co, 55 Ala., 576; Holt v. Agnew, 67 Ala., 360.

§ 7. The right of exemptions hereinbefore secured may be waived by an instrument in writing, and when such waiver relates to realty, the instrument must be signed by both the husband and the wife, and attested by one witness.

ARTICLE XI.

TAXATION.

§ 1. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property; *Provided, however*, The general assembly may levy a poll-tax, not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public school fund in the county so paying the same.

Mayor v. Dargan, 45 Ala., 310; Mayor v. Royal Street R. R. Co., Ib., 322; Mayor v. Stonewall Ins. Co., 53 Ala., 570; Shaver v. Robinson, 59 Ala., 195; Assessment Board v. Ala. Central R. R. Co., 59 Ala., 551; Board of Revenue v. Montgomery Gas-Light Co., 64 Ala., 269; Clark v. Mobile, 67 Ala., 217; Moog v. Randolph, 77 Ala., 597.

§ 2. No power to levy taxes shall be delegated to individuals or private corporations.

President, etc., v. Board for Improvement, etc., 45 Ala., 399.

§ 3. After the ratification of this Constitution, no new debt shall be created against, or incurred by this State, or its authority, except to repel invasion or suppress insurrection, and then only by a concurrence of two-thirds of the members of each house of the general assembly, and the vote shall be taken by yeas and nays and entered on the journals; and any act creating or incurring any new debt against this State, except as herein provided for, shall be absolutely void; *Provided*, The governor may be authorized to negotiate temporary loans, never to exceed one hundred thousand dollars, to meet deficiencies in the treasury; and until the same is paid, no new loan shall be negotiated; *Provided further*, That this section shall not be so construed as to prevent the issuance of bonds in adjustment of existing State indebtedness.

§ 4. The general assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one per centum on the value of the taxable property within this State.

Maguire v. Board of Revenue, 71 Ala., 401.

§ 5. No county in this State shall be authorized to levy a larger rate of taxation, in any one year, on the value of the taxable property therein, than one-half of one per centum; *Provided*, That to pay debts existing at the ratification of this Constitution, an additional rate of one-fourth of one per centum may be levied and collected, which shall be exclusively appropriated to the payment of such debts, or the interest thereon; *Provided further*, That to pay any debt or liability now existing against any

county, incurred for the erection of the necessary public buildings or other ordinary county purposes, or that may hereafter be created for the erection of necessary public buildings or bridges, any county may levy and collect such special taxes as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same shall have been levied and collected.

§ 6. The property of private corporations, associations, and individuals of this State shall forever be taxed at the same rate; *Provided*, This section shall not apply to institutions or enterprises devoted exclusively to religious, educational, or charitable purposes.

Mobile & Girard R. R. Co. v. Peebles, 47 Ala., 317; Mayor v. Stonewall Ins. Co, 59 Ala., 570; Assessment Board v. Ala. Central R. R. Co., 59 Ala., 551; Sumter County v. National Bank, 62 Ala., 464; Board of Revenue v. Montgomery Gas-Light Co., 64 Ala., 269; State Auditor v. Jackson County, 65 Ala., 142; Clark v. Mobile, 67 Ala., 217; State v. Board of Revenue, 73 Ala., 65; Moog v. Randolph, 77 Ala., 597.

§ 7. No city, town, or other municipal corporation, other than provided for in this article, shall levy or collect a larger rate of taxation, in any one year, on the property thereof, than one-half of one per centum of the value of such property, as assessed for State taxation during the preceding year; *Provided*, That for the payment of debts existing at the time of the ratification of this Constitution, and the interest thereon, an additional rate of one per centum may be collected, to be applied exclusively to such indebtedness; *And provided*, This section shall not apply to the city of Mobile, which city may, until the first day of January, one thousand eight hundred and seventy-nine, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed the rate of three-fourths of one per centum, to pay the expenses of the city government, and may also, until the first day of January, one thousand eight hundred and seventy-nine, levy a tax not to exceed the rate of one per centum, and from and after that time, a tax not to exceed the rate of three-fourths of one per centum, to pay the existing indebtedness of said city, and the interest thereon.

Ex parte City Council, 64 Ala., 463.

§ 8. At the first session of the general assembly after the ratification of this Constitution, the salaries of the following officers shall be reduced at least twenty-five per centum, viz.: Governor, secretary of state, state auditor, state treasurer, attorney-general, superintendent of education, judges of the supreme and circuit courts, and chancellors; and after said reduction, the general assembly shall not have the power to increase the same, except by a vote of a majority of all the members elected to each house, taken by yeas and nays, and entered on the journals; *Provided*, This section shall not apply to any of said officers now in office.

§ 9. The general assembly shall not have the power to require the counties or other municipal corporations to pay any charges which are now payable out of the state treasury.

ARTICLE XII.

MILITIA.

§ 1. All able-bodied male inhabitants of this State, between the ages of eighteen years and forty-five years, who are citizens of the United States, or have declared their intention to become such citizens, shall be liable to military duty in the militia of the State.

§ 2. The general assembly, in providing for the organization, equipment, and discipline of the militia, shall conform as nearly as practicable to the regulations for the government of the armies of the United States.

§ 3. Each company and regiment shall elect its own company and regimental officers; but if any company or regiment shall neglect to elect such officers within the time prescribed by law, they may be appointed by the governor.

§ 4. Volunteer organizations of infantry, cavalry, and artillery may be formed in such manner, and under such restrictions, and with such privileges, as may be provided by law.

§ 5. The militia and volunteer forces shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at musters, parades, and elections, and in going to and returning from the same.

§ 6. The governor shall, except as otherwise provided herein, be commander-in-chief of the militia and volunteer forces of the State, except when in the service of the United States, and shall, with the advice and consent of the senate, appoint all general officers, whose terms of office shall be for four years. The governor, the generals, and regimental and battalion commanders shall appoint their own staffs, as may be provided by law.

§ 7. The general assembly shall provide for the safe keeping of the arms, ammunition, and accoutrements, military records, banners, and relics of the State.

§ 8. The officers and men of the militia and volunteer forces shall not be entitled to, or receive any pay, rations, or emoluments, when not in active service.

ARTICLE XIII.

EDUCATION.

§ 1. The general assembly shall establish, organize, and maintain a system of public schools throughout the State, for the equal benefit of the children thereof between the ages of seven and twenty-one years; but separate schools shall be provided for the children of citizens of African descent.

§ 2. The principal of all funds arising from the sale or other disposition of lands or other property, which has been or may hereafter be granted or entrusted to this State, or given by the United States, for educational purposes, shall be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations.

§ 3. All lands or other property given by individuals, or appropriated by the State for educational purposes, and all estates of deceased persons who die without leaving a will or heir, shall be faithfully applied to the maintenance of the public schools.

§ 4. The general assembly shall also provide for the levying and collection of an annual poll-tax, not to exceed one dollar and fifty cents on each poll, which shall be applied to the support of the public schools in the counties in which it is levied and collected.

§ 5. The income arising from the sixteenth section trust fund, the surplus revenue fund, until it is called for by the United States government, and the funds enumerated in sections three and four of this article, with such other moneys, to be not less than one hundred thousand dollars per annum, as the general assembly shall provide by taxation or otherwise, shall be applied to the support and maintenance of the public schools; and it shall be the duty of the general assembly to increase, from time to time, the public school fund, as the condition of the treasury and the resources of the State will admit.

§ 6. Not more than four per cent. of all moneys raised, or which may hereafter be appropriated for the support of public schools, shall be used

or expended otherwise than for the payment of teachers employed in such schools; *Provided*, That the general assembly may, by a vote of two-thirds of each house, suspend the operation of this section.

§ 7. The supervision of the public schools shall be vested in a superintendent of education, whose powers, duties, term of office, and compensation shall be fixed by law. The superintendent of education shall be elected by the qualified voters of the State in such manner, and at such time, as shall be provided by law.

§ 8. No money raised for the support of the public schools of the State shall be appropriated to, or used for, the support of any sectarian or denominational school.

§ 9. The State University and the Agricultural and Mechanical College shall each be under the management and control of a board of trustees. The board for the university shall consist of two members from the congressional district in which the university is located, and one from each of the other congressional districts in the State. The board for the Agricultural and Mechanical College shall consist of two members from the congressional district in which the college is located, and one from each of the other congressional districts in the State. Said trustees shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold office for a term of six years, and until their successors shall be appointed and qualified. After the first appointment each board shall be divided into three classes, as nearly equal as may be. The seats of the first class shall be vacated at the expiration of two years, and those of the second class in four years, and those of the third class at the end of six years, from the date of appointment, so that one-third may be chosen biennially. No trustee shall receive any pay or emolument, other than his actual expenses incurred in the discharge of his duties as such. The governor shall be *ex officio* president, and the superintendent of education *ex officio* a member of each of said boards of trustees.

§ 10. The general assembly shall have no power to change the location of the State University, or the Agricultural and Mechanical College, as now established by law, except upon a vote of two-thirds of the members of the general assembly, taken by yeas and nays, and entered upon the journals.

§ 11. The provisions of this article, and of any act of the general assembly, passed in pursuance thereof, to establish, organize, and maintain a system of public schools throughout the State, shall apply to Mobile county only so far as to authorize and require the authorities designated by law to draw the portion of the funds to which said county will be entitled for school purposes, and to make reports to the superintendent of education, as may be prescribed by law. And all special incomes and powers of taxation, as now authorized by law for the benefit of public schools in said county, shall remain undisturbed until otherwise provided by the general assembly: *Provided*, That separate schools for each race shall always be maintained by said school authorities.

ARTICLE XIV.

CORPORATIONS.—PRIVATE CORPORATIONS.

§ 1. Corporations may be formed under general laws, but shall not be created by special act, except for municipal, manufacturing, mining, immigration, industrial, and educational purposes, or for constructing canals, or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be

attained under general laws. All general laws and special acts passed pursuant to this section may be altered, amended, or repealed.

Horst v. Mayor, 48 Ala., 129; Mayor v. Stonewall Ins. Co., 53 Ala., 570; Central A. & M. Asso'n v. Ala. Gold Life Ins. Co., 70 Ala, 120.

§ 2. All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith, at the time of the ratification of this Constitution, shall thereafter have no validity.

§ 3. The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any general or special law for the benefit of such corporation, other than in execution of a trust created by law or by contract, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution.

§ 4. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State.

American U. T. Co. v. Western U. T. Co., 67 Ala., 26; Beard v. Union & American P. Co., 71 Ala., 60.

§ 5. No corporation shall engage in any business other than that expressly authorized in its charter.

§ 6. No corporation shall issue stock or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock, first obtained at a meeting to be held after thirty days' notice is given in pursuance of law.

§ 7. Municipal and other corporations and individuals invested with the privilege of taking private property, for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The general assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers, or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to law.

Miller v. Mobile, 47 Ala. 163; Montgomery So. R. Co. v. Sayre, 72 Ala. 443.

§ 8. Dues from private corporations shall be secured by such means as may be prescribed by law; but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her.

§ 9. No corporation shall issue preferred stock without the consent of the owners of two-thirds of the stock of said corporation.

§ 10. The general assembly shall have the power to alter, revoke, or amend any charter of incorporation now existing, and revocable at the ratification of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of the State; in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew, or extend the charter of more than one corporation.

§ 11. Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and connect the same with other lines; and the general

assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph.

§ 12. All corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases as natural persons.

South & North R. R. Co. v. Morris, 65 Ala., 193; Home Protection v. Richards, 74 Ala., 466; Smith v. L. & N. R. R. Co., 75 Ala., 449.

§ 13. The term "corporation," as used in this article, shall be construed to include all joint stock companies, or any associations having any of the powers or privileges of corporations, not possessed by individuals or partnerships.

BANKS AND BANKING.

§ 14. The general assembly shall not have the power to establish or incorporate any bank or banking company, or moneyed institution, for the purpose of issuing bills of credit, or bills payable to order or bearer, except under the conditions prescribed in this Constitution.

§ 15. No banks shall be established otherwise than under a general banking law, nor otherwise than upon a specie basis.

§ 16. All bills or notes issued as money shall be at all times redeemable in gold or silver, and no law shall be passed sanctioning, directly or indirectly, the suspension by any bank or banking company of specie payment.

§ 17. Holders of bank notes, and depositors who have not stipulated for interest, shall, for such notes and deposits, be entitled, in case of insolvency, to the preference of payment over all other creditors.

§ 18. Every bank or banking company shall be required to cease all banking operations within twenty years from the time of its organization (unless the general assembly shall extend the time), and promptly thereafter close its business; but shall have corporate capacity to sue and shall be liable to suit, until its affairs and liabilities are fully closed.

§ 19. No bank shall receive, directly or indirectly, a greater rate of interest than shall be allowed by law to individuals for lending money.

§ 20. The State shall not be a stockholder in any bank, nor shall the credit of the State ever be given or loaned to any banking company, association, or corporation.

RAILROADS AND CANALS.

§ 21. All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points in this State, and to connect, at the State line, with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport, each, the other's freight, passengers, and cars, loaded or empty, without delay or discrimination.

§ 22. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freights and passenger tariffs on railroads, canals, and rivers in this State.

§ 23. No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount other than as sold to the public generally, to any member of the general assembly, or to any person holding office under this State or the United States.

§ 24. No street passenger railway shall be constructed within the limits of any city or town, without the consent of its local authorities.

§ 25. No railroad, canal, or other transportation company, in existence at the time of the ratification of this Constitution, shall have the benefit of any future legislation by general or special laws, other than in execution of a trust created by law, or by contract, except on the condition of complete acceptance of all the provisions of this article.

ARTICLE XV.

OATH OF OFFICE.

§ 1. All members of the general assembly, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices, shall take the following oath or affirmation, to-wit:

"I, —— ———, solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof, and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter to the best of my ability. So help me God."

Which oath may be administered by the presiding officer of either house of the general assembly, or any officer authorized by law to administer an oath.

ARTICLE XVI.

MISCELLANEOUS PROVISIONS.

§ 1. No person holding an office of profit under the United States, except postmasters whose annual salary does not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this State; nor shall any person hold two offices of profit at one and the same time under this State, except justices of the peace, constables, notaries public, and commissioners of deeds.

§ 2. It is made the duty of the general assembly to enact all laws necessary to give effect to the provisions of this Constitution.

ARTICLE XVII.

MODE OF AMENDING THE CONSTITUTION.

§ 1. The general assembly may, whenever two-thirds of each house shall deem it necessary, propose amendments to this Constitution, which, having been read on three several days in each house, shall be duly published in such manner as the general assembly may direct, at least three months before the next general election for representatives, for the consideration of the people; and it shall be the duty of the several returning officers, at the next general election which shall be held for representatives, to open a poll for the vote of the qualified electors on the proposed amendments, and to make a return of said vote to the secretary of state; and, if it shall thereupon appear that a majority of all the qualified electors of the State, who voted at such election, voted in favor of the proposed amendments, said amendments shall be valid, to all intents and purposes, as parts of this Constitution, and the result of such election shall be made known by proclamation of the governor.

§ 2. No convention shall hereafter be held for the purpose of altering or amending the Constitution of this State, unless the question of convention

or no convention shall be first submitted to a vote of all the electors of the State, and approved by a majority of those voting at said election.

SCHEDULE.

In order that no injury or inconvenience may arise from the alterations and amendments made by this Constitution to the existing Constitution of this State, and to carry this Constitution into effect, it is hereby ordained and declared,—

1. That all laws in force at the ratification of this Constitution, and not inconsistent therewith, shall remain in full force, until altered or repealed by the general assembly; and all rights, actions, prosecutions, claims, and contracts of this State, counties, individuals, or bodies corporate, not inconsistent with this Constitution, shall continue to be as valid as if this Constitution had not been ratified.

2. That all bonds executed by or to any officer of this State, all recognizances, obligations, and all other instruments executed to this State, or any subdivision or municipality thereof, before the ratification of this Constitution, and all fines, taxes, penalties, and forfeitures due and owing to this State, or any subdivision, or to any municipality thereof; and all writs, suits, prosecutions, claims, and causes of action, except as herein otherwise provided, shall continue and remain unaffected by the ratification of this Constitution. All indictments which may have been found, or which may hereafter be found, for any crime or offense committed before the ratification of this Constitution, shall be proceeded upon in the same manner as if this Constitution had not been ratified.

3. That all the executive and judicial officers, and all other officers in this State, who shall have been elected at the election held in this State, on third day of November, eighteen hundred and seventy-four, or who may have been appointed since that time, and all members of the present general assembly, and all that may hereafter be elected members of the present general assembly, and all other officers holding office at the time of the ratification of this Constitution, except such as hold office under any act of the general assembly, shall continue in office, and exercise the duties thereof until their respective terms shall expire, as provided by the present Constitution and laws of this State.

4. This Constitution shall be submitted to the qualified electors of this State for ratification or rejection, as authorized and required by an act of the general assembly of this State, entitled "An act to provide for the calling of a Convention to revise and amend the Constitution of this State," approved nineteenth day of March, A. D., eighteen hundred and seventy-five.

5. If at said election the said Constitution shall be found to have been ratified by a majority of all of the qualified electors voting at said election, the said new Constitution, so ratified, shall go into effect as the new Constitution of the State of Alabama within the time stated in the proclamation of the governor, and shall thereafter be binding and obligatory as such upon all the people of this State, according to the provisions of said act, approved nineteenth day of March, eighteen hundred and seventy-five.

6. That instead of the publication as required by section twelve of said act, the governor of the State is hereby authorized to take such steps as will give general publicity and circulation to this Constitution in as economical manner as practicable.

7. That all laws requiring an enumeration of the inhabitants of this State during the year eighteen hundred and seventy-five are hereby avoided.

8. That the board of education of this State is hereby abolished.

9. The salaries of the executive and judicial, and all other officers of

this State who may be holding office at the time of the ratification of this Constitution, and the pay of the present members of the general assembly shall not be affected by the provisions of this Constitution.

LEROY POPE WALKER, *President.*

John F. Burns,
J. H. White,
Sumpter Lea,
Wm. A. Smith,
R. A. McClellan,
E. D. Willett,
Rufus W. Cobb,
John W. Inzer,
Wm. G. Little,
W. Garrett,
John Manasco,
Lewis M. Stone,
Wiley Coleman,
Andrew C. Hargrove,
Evan G. Richards,
Henry W. Laird,
Wm. J. O'Bannon,
Geo. S. Gullett,
Geo. W. Delbridge,
Andrew J. Ingle,
Frank A. Nisbet,
John Gamble,
Isaac H. Parks,
Henry C. Lea,
Joel D. Murphree,
J. B. Kelly,
J. N. Swan,
Benj. F. Weathers,
Micajah L. Davis,
J. W. Jones,
John S. Dickinson,
Wm. Burgess,
P. M. Calloway,
John P. Ralls, M. D.,
Wm. S. Mudd,
John A. Foster,
James L. Pugh,
Jos. E. P. Flournoy,
John D. Hudson,
R. O. Pickett,
Richard H. Powell,
E. A. O'Neal,
Thomas B. NeSmith,
Wm. Green,
F. W. Sykes,
E. H. Moren,
Wm. C. Oates,
Stephen C. Allgood,
Samuel J. Bolling,
Leroy Brewer,
John T. Heflin,
Julius G. Robinson,
Samuel J. Forwood,
John Green,
Robert A. Long,
Charles C. Langdon,
F. S. Lyon,
Henry A. Woolf,
Wm. M. Hames,
Thos. J. Burton,
B. F. Johnson,
Alburto Martin,
R. C. Torrey,
M. T. Akers,
Albert W. Plowman,
Wm. A. Musgrove,
James D. Meadows,
W. J. Samford,
Geo. P. Harrison, Jr.,
John D. Rather,
Cephas B. Taylor,
James Aiken,
E. A. Powell,
A. C. Gordon.
Cullen A. Battle,
Jonathan Bliss,
D. B. Booth,
S. T. Prince,
A. A. Sterritt,
H. J. Livingston,
Wm. M. Lowe,
S. S. Scott,
Charles Gibson,
Thomas H. Herndon,
Jesse E. Brown,
David S. Nowlin,
John H. Norwood,
Montgomery Gilbreath.

Attest—Benj. H. Screws, *Secretary.*

CODE OF ALABAMA,

1886.

PART FIRST.

GENERAL PROVISIONS APPLICABLE TO THE WHOLE CODE; THE STATE ORGANIZATION, ITS COMMERCIAL, SANITARY, AND POLICE REGULATIONS.

TITLE I.

GENERAL PROVISIONS APPLICABLE TO THE WHOLE CODE.

1 (1). **Signification of words.**—Words used in this Code, in the past or present tense, include the future, as well as the past and present. Words used in the masculine gender include the feminine and neuter; the singular includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; "writing" includes printing on paper; "oath" includes affirmation; "signature" or "subscription" includes mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness. The terms "lunatic," "insane," or "non compos mentis," include all persons of unsound mind.

These definitions apply only to the words as used in this Code.—Bickley v. Keenan, 60 Ala. 293; Ala. Warehouse Co. v. Lewis, 56 Ala. 514. "Singular includes the plural, and the plural the singular."—Brunson v. Brooks, 68 Ala. 248. "Person" includes an artificial as well as a natural person.—P. & M. Bank v. Andrews, 8 Port. 404. But not, if thereby a statute is rendered inharmonious.—Mayor v. Rowland, 26 Ala. 498. "Writing" includes printing on paper, and this is true when an instrument is partly written and partly printed.—Johnson v. State, 69 Ala. 593. "Signature" or "subscription" includes a mark at common law, and was sufficient without an attestation, unless it was to an instrument the execution of which must have been attested.—Bailey v. Bailey, 35 Ala. 687; Wimberly v. Dallas, 52 Ala. 196; Bickley v. Keenan, 60 Ala. 293. But as to the instruments to which this section applies, their validity is negatived if the signature or subscription is by mark, and is not attested.—Bickley v. Keenan, 60 Ala. 293. A promissory note is not within the statute.—Wimberly v. Dallas, 52 Ala. 196. Nor a mortgage of personal property made before the statute required such mortgage to be in writing and subscribed.—Breene v. McCrary, 52 Ala. 154; Ala. Warehouse Co. v. Lewis, 56 Ala. 514.

2 (2). **Meaning of the terms "property," "circuit," "negro," etc.**—The following words have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes property, real and personal.
2. The words "real property" are co-extensive with lands, tenements and hereditaments.
3. The words "personal property" include money, goods, chattels, things in action and evidences of debt, deeds and conveyances.

4. The word "circuit" means judicial circuit.

5. The term "negro," within the meaning of this Code, includes mulatto. The term "mulatto," or "person of color," within the meaning of this Code, is a person of mixed blood, descended on the part of the father or mother, from negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person.

"Personal property" as used in the exemption statute. Enzor v. Hurt, 76 Ala. 595.

3 (3). **Joint authority exercised by a majority.**—All words giving a joint authority to three or more persons or officers, give such authority to a majority of such persons or officers, unless it is otherwise declared.

Jennings v. Jenkins, 9 Ala. 285.

4 (4). **Meaning of the word "justice."**—The word "justice," when applied to a magistrate, means "justice of the peace." "Justice of the peace," if not otherwise expressed, includes a notary public having and exercising the jurisdiction of a justice of the peace, within the precinct or ward for which he is appointed.

5 (5). **Meaning of "preceding" and "following."**—"Preceding" and "following" mean next before and next after.

6 (6). **Meaning of "State."**—The word "State," when applied to the different parts of the United States, includes the District of Columbia, and the several territories of the United States.

7 (7). **Meaning of "United States."**—The words "United States" include the territories thereof, and the District of Columbia.

8 (8). **Meaning of the words "month" and "year."**—The word "month" means a calendar month, and "year" a calendar year, unless otherwise expressed.

9 (9). **When undertaking without seal sufficient.**—When by law a bond is required, an undertaking without seal is sufficient, and must be taken in all respects as if the same was a sealed instrument.

10 (10). **Laws continued in force and laws repealed.**—This Code shall not affect any existing right, remedy, or defense, nor shall it affect any prosecution now commenced, or which shall be hereafter commenced, for any offense already committed. As to all such cases, the laws in force, at the adoption of this Code, shall continue in force. Local, private, or special statutes, and those public laws not of a general and permanent nature, and those relating to the swamp and overflowed lands, and those prescribing regulations of the harbor of Mobile, and concerning ships and seamen, are not repealed by this Code. But subject to the foregoing provisions, all statutes of a public, general, and permanent nature, not included in this Code, are repealed.*

Ulmer v. State, 61 Ala. 208; Hart v. Ross, 64 Ala. 96; Hatchett v. Billingslea, 65 Ala. 16; Carmichael v. Hays, 66 Ala. 543; Sawyers v. Baker, 72 Ala. 49; State v. McBride, 76 Ala. 51; Werborn v. Austin, 77 Ala. 381.

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*Rewritten by the joint committee of the two houses, to whom the work of the commissioners was referred.

11 (11). **Time, how computed.**—The time within which any act is provided by law to be done must be computed by excluding the first day and including the last; if the last day is Sunday, it must also be excluded.

Owen v. Slatter, 26 Ala. 547; Lang v. Phillips, 27 Ala. 311; Field v. Gamble, 47 Ala. 443; Dickson v. Frisbee, 52 Ala. 165; Allen v. Elliott, 67 Ala. 432; Madden v. Floyd, 69 Ala. 221.

TITLE II.

THE POLITICAL ORGANIZATION OF THE STATE.

CHAPTER 1.—The boundaries, sovereignty, jurisdiction, and seal of the state.
2.—Political divisions of the state.

CHAPTER 1.

THE BOUNDARIES, SOVEREIGNTY, JURISDICTION, AND SEAL OF THE STATE.

ARTICLE 1.—The boundaries of the state.
2.—The sovereignty and jurisdiction of the state.
3.—Great seal of the state.
4.—Cessions to the United States.

ARTICLE I.

THE BOUNDARIES OF THE STATE.

12 (12). **Boundaries.**—The boundaries of this state are established and declared to be as follows, that is to say: Beginning at the point where the thirty-first degree of north latitude crosses the Perdido river; thence east, to the western boundary line of the state of Georgia; thence along said line, to the southern boundary line of the state of Tennessee; thence west along the southern boundary line of the state of Tennessee, crossing the Tennessee river, and on to the second intersection of said river by said line; thence up said river to the mouth of Big Bear creek; thence by a direct line, to the north-west corner of Washington county in this state as originally formed; thence southerly along the line of the state of Mississippi, to the Gulf of Mexico; thence eastwardly, including all islands within six leagues of the shore, to the Perdido river; and thence up the said river to the beginning.

13 (13). **Boundary between Alabama and Georgia.**—The boundary line between Alabama and Georgia commences on the west side of the Chattahoochee river, at the point where it enters the state of Florida; from thence up the river, along the western bank thereof, to the point on Miller's Bend, next above the place where the Uchee creek empties into such river; thence in a direct line to the Nickajack.

In Howard v. Ingersoll, 17 Ala. 780, the boundary of the state, it was held, commenced at *low water mark*, on the west side of the Chattahoochee river, from the point where it enters the present state of Florida, to the "great bend" next above the place where the Uchee creek empties into the said river. In other words, *low*

water mark on the west side of the Chattahoochee river was the line which separated the jurisdiction of the state of Alabama from the state of Georgia. On writ of error to the supreme court of the United States, the decision was reversed, a majority of the court holding that the boundary line between the two states was not low water mark on the west side of the Chattahoochee river, but a line running up the river on and along its western bank, and that the jurisdiction of Georgia extended to the line which is washed by the water wherever it covers the bed of the river within its banks. The permanent fast land bank governs the line. From the lower edge of that bank the bed of the river commences, and the jurisdiction of Georgia extends to the lower edge of the bank on the west side of the river. *Nelson* and *Grier, JJ., dissenting, held*, that the true boundary line between the states of Georgia and Alabama was not a line drawn on the bank or bluff of the river, at high water mark, but the line marked by the permanent bed of the river, by the flow of the water at its usual and accustomed stage, and where the water will be found at all times in the season, except when diminished by drouth, or swollen by freshet.—Howard v. Ingersoll, 13 Howard, 381.

The boundary line between the states of Georgia and Alabama depends upon the construction of the following words of the contract of cession between the United States and Georgia, describing the boundary of the latter, namely: "West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river, and along the western bank thereof."—State of Alabama v. State of Georgia, 23 Howard U. S 505.

"It is the opinion of this court that the language implies that there is ownership of soil and jurisdiction in Georgia, in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme drouth of the summer or autumn."—Ib.

The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the above recited paragraph.—Ib.

By the contract of cession, the navigation of the river is free to both parties. Ib.

14 (14). **Boundary between Alabama and Florida.**—The boundary line between Alabama and Florida is the line commonly known as the "mound line," or "Ellicott's line," as distinguished from a blazed line, known as the "upper" or "Coffee line," commencing at a point on the Chattahoochee river, near a place known as "Irwin's Mills;" and from thence to the Perdido river, marked the whole distance by blazes on the trees and by mounds of earth, at distances of about one mile.

ARTICLE II.

THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

15 (15). **Sovereignty and jurisdiction, extent of.**—The sovereignty and jurisdiction of the state extend to all places within the boundaries thereof; but the extent of such jurisdiction over places that have been or may be ceded to the United States is qualified by the terms of such cession.

16 (16). **Authority and jurisdiction, how maintained.**—It is the duty of the governor, and all the subordinate officers of the state, to maintain and defend its authority and jurisdiction.

17 (17). **When governor may employ counsel.**—When any suit is instituted against any person deriving title from the State, to recover any lands within the limits of the same, under pretense of any claim inconsistent with its sovereignty and jurisdiction, the governor, at the expense of the state, must employ counsel and provide for the defense of such suit.

ARTICLE III.

GREAT SEAL OF THE STATE.

18 (18). **Great seal of state.**—The seal shall be circular, and the diameter thereof two and a quarter inches; near the edge of the circle shall be the word "Alabama," and opposite this word, at the same distance from the edge, shall be the words, "Great Seal." In the center of the seal there shall be a representation of an eagle and a shield, and upon such part of the seal as the governor may direct, there shall be the words, "Here we rest." The seal shall be called the "Great Seal of the State of Alabama."

ARTICLE IV.

CESSIONS TO THE UNITED STATES.

19 (19). **The United States may acquire lands.**—The United States may acquire and hold lands within the limits of this state, as sites for forts, magazines, arsenals, dock-yards, and other needful buildings, or either of them, as contemplated and provided by the Constitution of the United States, which purchase may be by contract with the owners, or as hereinafter provided for.

20 (20). **Value of the land, how determined.**—If the agent of the United States and the owner of such lands cannot agree as to the sale and purchase thereof, the chancery court of the district in which such lands lie, may, on the application of such agent, ascertain the value of such lands, and decree a conveyance thereof, as follows:

1. Reasonable notice of such application must be given to the owners of such lands by personal service.

2. The value of such lands must be ascertained by a jury summoned for that purpose, under the direction of the chancellor, or by any three persons agreed on by the parties, which jury, or persons, must be first sworn faithfully and impartially to determine such value.

3. Upon ascertaining the value of such lands, upon evidence or inspection of the same, by such persons appointed, or by the jury, under the direction of the chancellor, he must, on the payment of such value to the owner, or into court for his use, and the payment of all costs and expenses of the proceedings, direct a conveyance of such lands, by a certain time specified in such decree, to the United States for such purposes; and on failure to execute such conveyance within the time specified in such decree, the decree operates as a conveyance.

21 (21). **Governor to cede jurisdiction; restrictions.**—The governor, upon application made to him in writing on behalf of the United States for that purpose, accompanied by the proper evidence of the purchase, describing the lands sought to be ceded, is authorized on the part of the state to cede to the United States jurisdiction over such lands, to hold, to use, and occupy the same for the purpose of the cession, and none other. The jurisdiction thus ceded does not prevent the execution on such lands of any process, civil or criminal, under the authority of this state, nor prevent the laws of this state from operating over such lands; saving to the United States security to their property

within the limits of the jurisdiction ceded, and exemption of the same and of such lands from taxation under the authority of this state during the jurisdiction ceded.

22 (22). **Cession of submarine sites.**—Whenever the United States desire to acquire title to land belonging to this state, and covered by the navigable waters of the United States, and within the limits of this state, for the site of a light-house, beacon, or other aid to navigation, and application is made therefor by a duly authorized agent of the United States, describing the site required for one of the purposes aforesaid, then the governor of the state is authorized and empowered to convey the title to the United States, and to cede to the United States jurisdiction over the same; but no single tract shall contain more than ten acres, and this state shall retain jurisdiction concurrent with the United States, so far that all process, civil and criminal, issuing under the authority of this state, may be executed by the proper officers thereof upon any person amenable to the same, within the limits of the tract so ceded.

CHAPTER 2.

POLITICAL DIVISIONS OF THE STATE.

ARTICLE 1.—Counties and apportionment of representatives.
2.—Senatorial districts.
3.—Congressional districts.

ARTICLE I.

COUNTIES: APPORTIONMENT OF REPRESENTATIVES.

23 (23). **Number and names of counties.**—The state is divided into sixty-six counties, called: Autauga, Baldwin, Barbour, Bibb, Blount, Bullock, Butler, Calhoun, Chambers, Cherokee, Chilton, Choctaw, Clarke, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, Dallas, DeKalb, Elmore, Escambia, Etowah, Fayette, Franklin, Geneva, Greene, Hale, Henry, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Lowndes, Macon, Madison, Marengo, Marion, Marshall, Mobile, Monroe, Montgomery, Morgan, Perry, Pickens, Pike, Randolph, Russell, Shelby, St. Clair, Sumter, Talladega, Tallapoosa, Tuskaloosa, Walker, Washington, Wilcox, Winston.

As amended, Feb. 26, 1881. p. 117.

24 (24). **House of Representatives.**—The house of representatives of the general assembly consists of one hundred members, distributed among the several counties as follows: The counties of Autauga, Baldwin, Bibb, Blount, Butler, Calhoun, Chilton, Cherokee, Choctaw, Clarke, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, DeKalb, Elmore, Etowah, Escambia, Fayette, Franklin, Geneva, Henry, Lamar, Macon, Marion, Morgan, Monroe, Marshall, Randolph, Shelby, St. Clair, Walker, Washington, and Winston are each entitled to one representative. The counties of Bullock, Chambers, Greene, Hale, Jackson, Jefferson, Lauderdale, Lawrence, Limestone, Lee, Lowndes, Marengo, Perry, Pickens, Pike, Russell, Sumter, Talladega, Tallapoosa, Tuska-

loosa, and Wilcox are each entitled to two representatives. The counties of Barbour and Madison are each entitled to three representatives. The counties of Dallas, Mobile, and Montgomery are each entitled to four representatives.

25 (25). **Share of debts to be paid by new counties.**—In all cases in the formation of new counties, the inhabitants cut off from any county are liable in law and equity for the payment of their pro rata amount of the existing debt of the counties from which they have been severed.

Chambers County v. Lee County, 55 Ala. 534; Askew v. Hale County, 54 Ala. 639.

26 (26). **How ascertained, and proceedings thereupon.** The court of county commissioners of any county from which a portion of its territory and inhabitants has been taken to form a new county, must ascertain, as nearly as practicable, the entire debt of their county at the time such portion of their county was taken off, and out of such indebtedness must ascertain the pro rata share due from that part of the county taken off, and transmit a certified statement of the amount to the court of county commissioners of the new county to which such portion of their territory has been attached, and the court of county commissioners of the new county must then issue a certificate of indebtedness for such certified amount in favor of the county making such certified statement, which shall be paid by said new county as now provided by law for the payment of county dues.

27 (27). **Their jurisdiction over navigable streams.**—The jurisdiction over navigable streams, not included within the limits of any county, belongs to the county or counties whose jurisdiction extends to the margin thereof, and all process may be executed on such streams by officers of either county.

ARTICLE II.

SENATORIAL DISTRICTS.

28 (28). **Division of State into senatorial districts.**—The senatorial districts are as follows: First, Lauderdale and Limestone; second, Colbert and Lawrence; third, Morgan, Winston, Blount and Cullman; fourth, Madison; fifth, Marshall, Jackson and DeKalb; sixth, Cherokee, Etowah and St. Clair; seventh, Calhoun and Cleburne; eighth, Talladega and Clay; ninth, Randolph and Chambers; tenth, Macon and Tallapoosa; eleventh, Bibb and Tuskaloosa; twelfth, Franklin, Marion, Fayette and Lamar; thirteenth, Walker, Jefferson and Shelby; fourteenth, Greene and Pickens; fifteenth, Coosa, Elmore and Chilton; sixteenth, Lowndes and Autauga; seventeenth, Butler and Conecuh; eighteenth, Perry; nineteenth, Choctaw, Clarke and Washington; twentieth, Marengo; twenty-first, Monroe, Escambia and Baldwin; twenty-second, Wilcox; twenty-third, Henry, Coffee, Dale and Geneva; twenty-fourth, Barbour; twenty-fifth, Pike, Crenshaw and Covington; twenty-sixth, Bullock; twenty-seventh, Lee; twenty-eighth, Montgomery; twenty-ninth, Russell; thirtieth, Dallas; thirty-first, Sumter; thirty-second, Hale; thirty-third, Mobile.

As amended, Feb. 10, 1883, p. 44.

ARTICLE III.

CONGRESSIONAL DISTRICTS.

As amended, Feb. 10, 1883, p. 44.

29 (29). **State divided into congressional districts.**—The state is divided into eight congressional districts, as follows: The first district shall be composed of the counties of Clarke, Choctaw, Marengo, Mobile, Monroe and Washington. The second district shall be composed of the counties of Baldwin, Butler, Conecuh, Crenshaw, Covington, Escambia, Montgomery and Pike. The third district shall be composed of the counties of Barbour, Bullock, Coffee, Dale, Geneva, Henry, Lee and Russell. The fourth district shall be composed of the counties of Dallas, Hale, Lowndes, Perry and Wilcox. The fifth district shall be composed of the counties of Autauga, Bibb, Chambers, Chilton, Coosa, Clay, Elmore, Macon and Tallapoosa. The sixth district shall be composed of the counties of Fayette, Greene, Jefferson, Marion, Pickens, Lamar, Sumter, Tuskaloosa, Walker and Winston. The seventh district shall be composed of the counties of Blount, Calhoun, Cherokee, Cleburne, Cullman, DeKalb, Etowah, Marshall, Randolph, St. Clair, Shelby and Talladega. The eighth district shall be composed of the counties of Colbert, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison and Morgan.

30 (30). **One representative for each district, and by whom chosen.**—Each district is entitled to one representative to the congress of the United States, who shall be chosen by the qualified electors of the district.

TITLE III.

THE LEGISLATIVE AND EXECUTIVE DEPARTMENTS.

CHAPTER 1.—The legislative department.
2.—The executive department.

CHAPTER 1.

THE LEGISLATIVE DEPARTMENT.

ARTICLE 1.—The general assembly.
2.—Subordinate officers of the general assembly.

ARTICLE I.

THE GENERAL ASSEMBLY.

31 (31). **Biennial sessions and length; place of meeting.** The general assembly shall meet biennially, at the capitol, in the senate chamber, and in the hall of the house of representatives (except in cases of the destruction of the capitol, or epidemics, when the governor may convene them at such place as he may deem best), on the day prescribed by law, and shall not remain in session longer than fifty days.

32 (32). **Time of meeting.**—The general assembly shall meet on Tuesday, after the second Monday in November, 1888, and biennially thereafter on the same day.

33 (33). **Elections by general assembly; how conducted.** All elections by the general assembly are to be as follows:

1. On the day and hour appointed for the election, the members of both houses must assemble in the representative hall.

2. The names of the members of each house are to be called by their respective clerks, each member voting viva voce as his name is called.

3. The result must then be ascertained by the president of the senate and the speaker of the house, and announced by the last named officer.

4. The votes are to be given for but one election at the same time, and a majority of the whole number of votes given is necessary to a choice.

34 (34). **Committee appointed to examine offices of auditor and treasurer.**—During the first week of each regular session of the general assembly, the presiding officers must appoint a committee of three members of each house, jointly to examine the offices of auditor and treasurer.

35 (35). **Duty of examining committee.**—It is the duty of such committee to examine the accounts and vouchers of such officers as to all moneys received into, and paid out from the treasury during the two preceding fiscal years; to compare the warrants drawn by the auditor during that period, with the several laws by authority of which they purport to be drawn; to examine into the other accounts and books of such offices, and to count the money on hand at the time of the examination.

36 (36). **What the committee must report.**—Such committee must report to their respective houses the amount of money received into and paid out of the treasury during the two preceding fiscal years, on warrants drawn by the auditor, if such auditor was authorized by law to draw such warrants; specifying such as, in their opinion, were drawn without authority, and their reasons therefor; the time when the treasurer in office entered upon his duties, and the amount of money received by him up to the time of such examination; the balance in the treasury on the first day of November preceding, and at the time of such examination; the condition of such offices, and the correctness of all books and accounts required by law to be kept therein.

37 (37). **When examination and report must be made.** Such examination and report must be made during the session.

38 (38). **Papers of general assembly, deposit of.**—At the close of each session, the secretary of the senate, and the clerk of the house of representatives, and secretary of state must select all the papers belonging to the general assembly, except such as relate to the unfinished business, and deposit them in the office of the secretary of state.

39 (39). **Engrossed copies of laws, etc., to be preserved.** The engrossed copies of all laws and joint resolutions passed by the general assembly must be preserved by the chairman of the enrolling committee, and deposited in the office of the secretary of state.

40 (40). **Papers and documents, how filed and arranged.** The secretary of the senate, and the clerk of the house of representatives must, within ten days after the adjournment of each session, assort all the papers and documents of their respective houses, relating to the unfinished business of the session, and arrange them in files, as follows:

1. All petitions, with the accompanying documents, to be arranged and filed in alphabetical order, tied up in convenient packages, with a label on each, showing the character of the documents, and the session to which they relate.

2. All bills rejected on the first reading must be arranged, filed and labeled in like order; and so of bills rejected on the second and third reading; the labels in each case showing on what reading the bills were rejected.

3. All communications from the governor, auditor, treasurer, or other officer or person, which have been received during the session, and not entered at length on the journals, must be arranged, filed and labeled in separate packages, showing from what department, officer, or person the same were received.

4. Reports from standing and select committees must be arranged, filed and labeled in like manner.

5. Any other papers or documents, not included under either of the foregoing heads, must be arranged, filed and labeled as miscellaneous papers; the label showing the session to which they belong, and, as near as practicable, the character of the papers; and in every instance, to which branch of the general assembly they belong.

41 (41). **Secretary of state to receipt for papers.**—The records, papers and documents, thus arranged, filed and labeled, must be delivered to the secretary of state, who, upon receipt of the same, must certify that such secretary and clerk have respectively complied with the requisitions of the preceding section; and no warrant must be drawn by the auditor, and no money paid by the treasurer, for such services, without the production of such certificate, which must be kept by the treasurer as a voucher.

42 (42). **Official oath of members, by whom administered.**—The oaths of office may be administered to the members of the general assembly by any judge of the supreme or circuit court, judge of probate, or justice of the peace, or the presiding officer of the senate, or the speaker of the house of representatives; and the president of the senate and the speaker of the house may be sworn in by any member of their respective bodies.

As amended, Feb. 5, 1879, p. 52.

43 (43). **Pay and mileage of officers and members.**—The president of the senate and speaker of the house of representatives shall each receive six dollars for each day's attendance, and each member of the general assembly shall receive four dollars for each day's attendance; the president of the senate and speaker of the house and each member of the general assembly shall be allowed ten cents a mile for every mile's travel in going to and returning from the seat of government, according to the distance herein specified, to-wit: Autauga, thirty miles; Baldwin, one hundred and ninety-five miles; Barbour, one hundred miles; Bibb, one hundred and five miles; Blount,

one hundred and fifty miles; [1]Bullock, forty-five miles; Butler, forty-five miles; Calhoun, one hundred and fifty miles; Chambers, eighty-three miles; Chilton, forty miles; Cleburne, one hundred and sixty miles; [2]Cherokee, one hundred and eighty-three miles; Choctaw, two hundred and twenty-three miles; Clarke, two hundred and twenty-three miles; Clay, one hundred and thirty-five miles; [3]Coffee, one hundred and two miles; Conecuh, eighty-two miles; Colbert, two hundred and twenty-six miles; Coosa, forty-five miles; Covington, one hundred and fifteen miles; Crenshaw, sixty-seven miles; Cullman, one hundred and fifty miles; Dale, one hundred and four miles; Dallas, fifty miles; DeKalb, one hundred and eighty-six miles; Elmore, twenty miles; Escambia, one hundred and fourteen miles; Etowah, one hundred and sixty miles; Fayette, one hundred and ninety-one miles; Franklin, two hundred and forty-four miles; Geneva, one hundred and twenty miles; [4]Greene, one hundred and eighty-seven miles; Hale, one hundred and two miles; Henry, one hundred and ten miles; Jackson, two hundred and fifty miles; Jefferson, ninety-six miles; Lauderdale, two hundred and thirty-one miles; [5]Lamar, two hundred and fifty miles; Lawrence, two hundred and eighteen miles; Lee, sixty-six miles; Limestone, two hundred and fourteen miles; Lowndes, twenty-five miles; Macon, forty-five miles; Madison, two hundred and fifteen miles; Marengo, one hundred and five miles; [6]Marion, two hundred and fifty miles; Marshall, two hundred and forty-two miles; Mobile, one hundred and eighty-five miles; Monroe, one hundred and nine miles; Montgomery, ——; Morgan, one hundred and eighty-three miles; Perry, eighty miles; Pickens, one hundred and eighty miles; [7]Pike, seventy-six miles; Randolph, one hundred and twenty miles; [8]Russell, seventy-four miles; Shelby, seventy-five miles; St. Clair, one hundred and forty miles; Sumter, one hundred and thirty-five miles; [9]Talladega, one hundred and ten miles; Tuskaloosa, one hundred and fifty-two miles; Tallapoosa, ninety-seven miles; Walker, one hundred and fifty-three miles; Washington, two hundred and fifty miles; [10]Wilcox, one hundred and ten miles; Winston, one hundred and eighty-eight miles.

[1]March 1, 1881, p. 166.
[2]Ib.
[3]Ib.
[4]Ib.
[5]Ib.
[6]Ib.
[7]Ib.
[8]Ib.
[9]Ib.
[10]Ib.

44 (44). **Pay in case of sickness.**—If, in consequence of sickness, any member is detained, after leaving home, in going to the seat of government, or is unable to attend the house, after he arrives there, he is entitled to the same pay as an attending member.

45. Pay of committees sitting during recess, and of their clerks.—Members of the general assembly, who may be required by a joint resolution or a resolution of either house to serve on a committee during any recess of the general assembly, and all clerks whom said committee may be authorized to employ, shall each receive four dollars per day while engaged on the work assigned such committee; and the members of said committee shall also receive the same mileage they receive for attending the general assembly. The chairman of such committee shall certify to the auditor what amount is due such member or clerk, who must draw his warrant therefor on the state treasurer.

46 (45). **Mileage when intervals between sessions are not more than four days.**—When the interval between a regular and called session, or between a called and regular session, is not more than four days, no mileage shall be allowed.

Ex parte Pickett, 24 Ala. 91; Ex parte Matthews, 52 Ala. 51.

47 (46). **Amount of pay due, how certified.**—The compensation due to the officers and members of the general assembly must be certified by the president and speaker, respectively, to the auditor, who must issue his warrant therefor on the state treasurer.

48 (47). **Notice of local law.**—The notice required in article four, section twenty-four, of the constitution, shall be given in some newspaper printed in the county where the passage of local or special laws is desired, or by posting such notices at three public places in the locality or county interested in such legislation. If the notice be given through a newspaper published in the county, the notice shall be given at least three times through its columns, commencing at least twenty days before the introduction of the local measure; and a copy of the notice, specifying the time when the same was made, and how made, which shall be sworn to by a responsible person of the county before some justice of peace or notary public, that the facts therein contained are true, shall accompany the bill on its introduction to either house of the general assembly.

ARTICLE II.

SUBORDINATE OFFICERS OF THE GENERAL ASSEMBLY; THEIR ELECTION, APPOINTMENT, TERM OF OFFICE, REMOVAL, DUTIES, COMPENSATION.

49 (48). **Oaths to subordinate officers, by whom administered.**—The president of the senate and speaker of the house are to administer the oaths required to the subordinate officers of their respective houses.

50 (49). **Subordinate officers; election; term of office, and removal.**—The subordinate officers of the general assembly shall consist of a secretary, an assistant secretary, an enrolling and engrossing clerk, a door-keeper, and an assistant door-keeper, for the senate; and a clerk, an assistant clerk, an engrossing clerk, an enrolling clerk, a door-keeper, and an assistant door-keeper, for the house of representatives; which officers shall be elected by each house, respectively, at the beginning of each session of the general assembly, or at such other time as may be necessary, who shall hold their offices until the close of the session, except the secretary and door-keeper of the senate, and the clerk and door-keeper of the house, who shall hold their offices until their successors are qualified; and may be removed for cause by each house respectively.

Moren v. Blue, 47 Ala. 709.

51 (50). **Compensation of secretary and clerk and assistants; additional duties of assistants.**—The secretary of the senate, and the clerk of the house of representatives shall each receive six dollars per day. The assistant secretary of the senate and the assistant clerk of the house of representatives shall each

receive six dollars per day; and, in addition to their regular duties, shall keep a register of all the bills, resolutions and memorials that may be introduced by the members of their respective houses, showing the title of each bill, resolution and memorial, the time when, and by whom introduced, the date of their several readings, and, if referred, to what committee, and the final disposition thereof.

52 (51). **Compensation of enrolling and engrossing clerks, door-keepers and assistants; sergeant-at-arms.**—The enrolling and engrossing clerk of the senate, the engrossing clerk of the house, and the enrolling clerk of the house shall each receive five dollars per day; the door-keeper and assistant door-keeper of each house shall each receive four dollars and a hal per day. The door-keeper of each house shall be charged with the duties of a sergeant-at-arms, and shall keep order in the lobby and galleries.

53 (52). **Pages and their compensation; messenger of house and his compensation.**—The president of the senate shall appoint two pages for the senate, and the speaker of the house of representatives shall appoint three pages and one messenger for the house. The pages and messenger shall each receive two dollars and a half per day.

54 (53). **Servants employed by door-keepers; compensation.**—The door-keeper of the senate may employ one servant for the senate, and the door-keeper of the house of representatives may employ not more than two servants for the house, who shall each receive two dollars and a half per day.

55 (54). **Committee clerks, and additional clerical assistance; compensation.**—Each house may, by resolution, provide for the employment of committee clerks, when necessary, whose compensation shall not exceed four dollars per day; and also for the employment of additional clerical assistance, when the business of either house shall require it; and the clerks so employed shall each receive four dollars per day for the time actually employed, to be certified as other officers.

56 (55). **Pay of subordinate officers; how certified and paid.**—The compensation due to the officers and employes hereinbefore named shall be certified by the president of the senate and the speaker of the house of representatives respectively, to the auditor, who shall issue his warrant therefor.

CHAPTER 2.

THE EXECUTIVE DEPARTMENT.

ARTICLE 1.—The Governor.
2.—The Secretary of State.
3.—The Auditor.
4.—The Treasurer.
5.—The Attorney-General.
6.—The Department of Agriculture.
7.—The Military.

ARTICLE I.

THE GOVERNOR.

57 (56). **Duty as to offices and rooms in capitol.**—The governor must assign rooms in the capitol to the secretary of state, auditor, attorney-general, superintendent of education, treasurer, railroad commission, president of inspectors of convicts, and adjutant general; and in the absence of any legislative provision, designate the purposes to which other rooms are to be applied.

58 (57). **Private secretary and his salary.**—He may employ a private secretary, whose annual salary shall be fifteen hundred dollars, payable as in case of other officers employed at the seat of government.

59 (58). **Recording secretary and his salary.**—He may employ a recording secretary at an annual salary of one thousand dollars, payable as the salaries of other officers employed at the seat of government.

60 (59). **Governor may discontinue services of secretaries.**—The governor may discontinue the services of one or both of such secretaries, whenever the services may be no longer needed.

61 (60). **Private secretary made keeper of the capitol.** The private secretary of the governor is made keeper of the capitol, and he is required to perform the duties of that office.

62 (61). **His duties as keeper of the capitol.**—The duties of such office are to take care of the capitol, the grounds, enclosures, furniture, and all other property of the State on the premises, under the general control and supervision of the governor; and also in the recess of the general assembly, to have all the apartments that are not regularly used and occupied, and the public entries, walls and stairs in each story well cleaned and ventilated.

63 (62). **His pay for services as such keeper.**—The private secretary, for his services as keeper of the capitol, shall receive the annual sum of one hundred and fifty dollars, to be paid at the same times and in the same manner as his salary.

64 (63). **Appointment of commissioners in other states.** The governor may appoint commissioners in the other states and territories of the United States, to take and certify depositions,

to receive the acknowledgment and take the proof of conveyances of property within this state, and the proof of wills executed by persons without the state, devising or bequeathing property within this state. Commissioners appointed under this section shall hold office for three years.

Courts take judicial notice of appointment. Keller v. Moore, 51 Ala. 340.

65 (64). **Bonds approved by the governor filed with auditor.**—All bonds approved by the governor, except the auditor's bond, must be filed in the auditor's office.

66 (65). **Governor's oath, by whom and when administered.**—The oath required by the fifteenth article of the constitution of this state is administered to the governor by the presiding officer of either house of the general assembly, or any officer authorized to administer an oath, in the presence of both houses of the general assembly.

67 (66). **His salary.**—The salary of the governor is three thousand dollars per annum.

68 (70). **Employment of additional clerks in the state departments.**—1. Whenever the employment of any clerical assistance, in addition to that prescribed by law, in any of the state departments, may become necessary in the transaction of the public business, the head of such department must certify to the governor an application for such additional force, setting forth the contingency and the nature and extent of the work to be done, and that the same cannot be performed within the time that the public interest requires by the regular force employed in such department, and thereupon the governor, being satisfied that the public interest demands such service, must issue an order authorizing the employment of such clerical assistance for such time as he may deem necessary, and cause the application to be filed in his office; and no such clerk or assistant shall be employed until such application is certified and such order passed.

2. All such clerks must perform not less than eight hours' service in every twenty-four hours, or the writing of not less than ten folio pages in every twenty-four hours, for the time for which they are employed.

3. The compensation of such clerks must be paid upon account stated, certified by the head of the proper department that the same is correct, and for services performed under the provisions of this section, and approved by the governor, upon the warrant of the auditor, out of any money in the treasury not otherwise appropriated.

69 (71). **Employment of servant.**—One servant must be employed for the executive offices of the state, who must be paid monthly out of any money not otherwise appropriated, on the auditor's warrant, drawn upon the governor's certificate.

70. Compromise of claims in favor of the state.—The governor, attorney-general and auditor have authority to adjust, compromise and settle, on such terms as to them may seem just and reasonable, any claim of the state against any person, or any public officer, or his sureties, arising under the revenue laws; or because of the negligence or default in the

Feb. 13, 1879, p. 176, sec. 1.

safe keeping, collection, or disbursement of the public moneys, or funds, or property by any officer having charge or custody of either.

Ib. sec. 2.

71. Statement of compromise to be filed.—Such settlement or compromise being made, the governor must file a statement thereof in the office of the treasurer, showing the nature and character of the claim, the terms of the settlement or compromise, and the reasons for the making thereof.

Feb. 23, 1883, p. 162, sec. 1.

72. Suits for the recovery of public moneys.—The governor has authority to cause suits to be instituted for the recovery of any public moneys or funds lost by the neglect or default of any public officer, or which have been wrongfully expended or disbursed by such officer, or which have been wrongfully used by such officer, or wrongfully received from him.

Ib. secs. 1, 2.

73. Suits for money wrongfully used.—In the event any public officer, or any agent of the state, or any depositary or custodian of the public funds or moneys, has wrongfully used such funds or moneys, suits for the recovery thereof may be instituted at law or in equity, before any court having jurisdiction of the subject-matter; and it shall not be ground of objection to such suit that either, or any, or all of the parties defendant do not reside within the county, or within the district in which such suit is instituted.

Ib. secs. 1, 2.

74. Suit in equity.—Such suit may be instituted in a court of equity without the statement or assignment of any special cause for equitable interference; and such officer, or agent, such depositary or custodian, and the sureties on his official bond, or any one or more of them, may be joined as parties defendant; and any person who has wrongfully received such moneys or funds from such officer, agent, depositary, or custodian, may also be joined as a party defendant. No objection to such suit because of multifariousness must be entertained; nor shall the state be put to an election between the prosecution of such suit, and any suit at law instituted for the same purpose, or for the recovery of the same claim or demand.

Ib. sec. 3.

75. Auxiliary writs.—In aid of such suit, the court of chancery shall, on application, supported by the affidavit of the governor, or of the attorney-general, or solicitor, or of an attorney employed in the prosecution of such suit, showing just and legal cause, direct the issue of writs of attachment, of garnishment, of seizure, ne exeat, or of any other proper writ or process, which may be deemed necessary for the security of the state, or to render effectual the decree in such suit, if it should be rendered in favor of the state. Bond and security shall not be required of the state upon, or for the issue of any such writ or process.

Ib. sec. 3.

76. Levy of writs.—Such writs may be levied on any and all property, real or personal, rights or credits, in which the party against whom the same may issue, has any estate, or any interest, legal or equitable, subject to the payment of the debt or demand preferred in such suit; and upon any and all property, real or personal, rights or credits, which may have been conveyed, assigned, or transferred in fraud of creditors. The levy of such writs creates a lien from the day it is made. All property levied on may be replevied in the mode provided

by law for the replevy of property on which an equitable attachment is levied; and if the property, or any part thereof, is not forthcoming to answer the decree of the court, the replevin bond shall have the force and effect of a judgment for such sum as the court may decree on motion, after notice to the obligors, or any one or more of them, or their personal representatives, if any one or more of them should be dead.

77. Proceedings; decree.—The court shall have full power to make any and all such orders in reference to any other suit, at law or in equity, which may be pending on the same claim or demand, against any one or more of the defendants, as justice may require; and the court may render a final decree against all of the defendants jointly, or against them severally, as the ends of justice may seem to require. For the making of all necessary orders or decrees in said suit, the court shall be deemed open at all times. Ib. sec. 4.

78. Trial by jury.—If in the progress of such suit, any matter of fact arises, or any issue is presented, which is properly triable by jury, at any time within ten days after such matter of fact or issue is shown by the pleadings, a trial by jury may be claimed, by filing a written demand therefor. Such demand being filed, the court must order a jury to be summoned and impaneled at such time as it may appoint, for the trial and determination of such matter of fact or issue, which trial shall in all respects be conducted as trials by jury are conducted in civil cases in courts of law. The verdict of the jury shall have the force and effect of a verdict in a court of law; and for good cause, the court may set the verdict aside and order a new trial. If within the period of ten days aforesaid, a trial by jury is not claimed, the right thereto is waived, but the court may, in its discretion, order and direct such trial notwithstanding such waiver. Ib. sec. 5.

79. Suits in foreign jurisdiction.—The governor may, whenever the interests of the state may require, order and direct suits to be brought in the name of the state in any foreign jurisdiction, for the recovery of any moneys due or owing to the state, or upon any claim or demand on which the state is entitled to sue; and for the prosecution of such suits may employ counsel, and may, for such sum as is necessary to pay the costs or expenses thereof, order the auditor to draw a warrant on the treasury. Ib. sec. 6.

80. Examiner of public accounts.—The governor is authorized to appoint an expert accountant, of known integrity and skill, who shall act as examiner of public accounts, and whose duty it shall be, under the direction of the governor, whenever required to do so, to audit and examine the books, accounts and vouchers of the secretary of state, the auditor, the treasurer, the superintendent of education, and the warden of the penitentiary, or such officer as may have charge of the books, accounts and vouchers pertaining to the state convicts, their hires, expenses and management, and also the books, accounts and vouchers pertaining to the revenue receipts and expenses of the University of Alabama, the Alabama Insane Hospital, the Agricultural and Mechanical College of Alabama, the Alabama Institution for the Deaf, Dumb, and the Blind, and of the several normal schools of the state. The governor shall have authority to direct and control the examiner; and when Feb. 16, 1885, p. 122, sec. 1.

he deems it necessary, may require him to examine the accounts of any state or county officer charged with the duty of collecting or disbursing any part of the public revenue; and shall fix his compensation at not exceeding ten dollars per day, while actually employed for the state, the examiner to pay his own expenses; and the governor shall prescribe the time for which he shall be employed. When required by the governor to do so, the examiner shall have the money in the treasury counted, in which case the governor shall require either the auditor, the secretary of state, or the attorney-general, or all of them, to be present to supervise the count, and to join in certifying the result to the governor.

Ib. secs. 2, 5.

81. Commission; authority.—A commission shall issue to the examiner, vesting in him authority to do and perform the acts mentioned in the last preceding section; and he shall have authority to issue subpœnas for witnesses, whom he may have to examine, administer oaths to them, and to compel their attendance; and shall have full authority to require officers whose books and accounts are examined, and their clerks, to render him assistance, and give him information needed in the prosecution of his investigations. Whenever any officer or clerk refuses to render the examiner assistance, or give him information as required by this section, or any witness fails to attend when summoned, or refuses to testify, the examiner must report the fact forthwith to any supreme court, circuit, or city court judge, or chancellor, who shall immediately issue a rule to said officer, clerk, or witness to show cause why he should not be committed to jail as for contempt. On the day fixed in said rule, if it has been served, the judge or chancellor must examine said officer, clerk, or witness; if he appears, and unless some lawful reason is shown for such default or refusal, must commit such offending person to jail until he renders the assistance, gives the information, or testifies as required by law. The examiner shall not have power to prescribe how books and accounts shall be kept, or to regulate the mode of conducting business in any public office; and whenever the legality of any payment is involved, he shall submit the principles of law involved to the attorney-general for his advice and opinion, and be governed thereby.

Ib. sec. 2.

82. Appointment revocable.—The appointment of the examiner is revocable at the discretion of the governor. In the event of revocation, the governor may at pleasure appoint a successor.

Ib. sec. 3.

83. Examiner's report.—The examiner shall, from time to time, report to the governor, under oath, the results of his examination, and the true condition and state of the books and accounts examined at the time of his examination. Such reports shall be public records. Before each session of the general assembly, the governor may cause seven hundred and fifty copies of such reports, with such explanations and comments as the governor may think proper to be printed, for the use of the general assembly, which said printing shall be by the public printer, and paid for as other public printing is paid for.

ARTICLE II.

SECRETARY OF STATE.

84 (73). **Duties of secretary of state.**—It is the duty of the secretary of state,—

1. To keep the state seal, the original statutes and public records of the state, the records and papers belonging to the general assembly, keeping the papers of each house separate.

2. To attest commissions, pardons and all other public documents from the executive of the state, and, when necessary, affix the seal of the state thereto, and certify the same in his official capacity.

3. To record, in books proper for that purpose, all grants and patents issued by the state.

4. To keep all books, maps and other papers appertaining to the survey of any lands belonging to the state, and the books and papers belonging to the land office at Courtland.

5. The books, maps and field notes of the late surveyor-general of the United States, for this state, are public archives of the state, and the secretary of state must keep them in his office, and must, upon application, give certified copies from the same, which shall be received in evidence in any of the courts of this state.

6. To certify, on application and the payment of lawful fees, copies of all records, grants, papers and laws of the several states, or of the United States.

7. To make annually, by the thirtieth day of September, a verified and itemized account of all moneys and fees received in his office, and of all payments and disbursements made by him; which must be reported to and filed with the governor, and by him must be transmitted to the next succeeding general assembly. Feb. 12, 1879, p. 188.

8. To supply the books and stationery for the general assembly, the executive, judges of the supreme court, and the several departments of state.

9. To give notice to the solicitors of the respective circuits of all officers who fail to file their bonds in his office, or make returns of elections, within the time prescribed.

10. He must procure the acts and resolutions of the general assembly, of which distribution is directed, to be half-bound and lettered.

11. He must receive from the state printer ten additional copies of all bills, joint resolutions and memorials printed by order of either house of the general assembly, and on the adjournment of each session of the general assembly, have one of each of such copies bound together in a cheap form, and file them and the copies not bound in his office.

12. He must, on entering into the contract provided for in section 832 (751) furnish to the courts of county commissioners, from the records now in his office, exact copies of the field-notes of the original surveys of all the lands in their respective counties; which shall be on books of proper size, to be supplied by such courts, at the close of which he shall append his certificate as to the correctness thereof under the great seal of the state.

13. He is authorized to procure from the general land office, at Washington City, complete lists of the entries of public lands

in Alabama, so as to be enabled to complete the Alabama state tract books in his office to date; the expenses attending the procurement of which to be paid upon his certificate to the auditor, who shall draw a warrant on the state treasurer.

14. He must procure lists of entries of public lands in this state annually, so as to comply with the following subdivision of this section, the expense to be paid as provided in the last foregoing subdivision.

15. He must, by the first day of October, in each year, enter on the tract books a list of all the lands (not already so entered) sold by the United States, and must make out and furnish each probate judge, by the first day of January, in each year, a register or statement showing all the lands so sold in the county of such judge, and not embraced in any register or statement previously furnished; and he may employ a person at not exceeding thirty cents per page of ordinary foolscap paper, to be paid on the warrant of the auditor, in favor of the person so employed, upon the certificate of the secretary of state, stating that the services have been correctly performed according to the contract, and specifying the amount due therefor.

16. To perform such other duties as he is or may be required to perform by law.

85 (74). **Duties under section 30, article 4, of the constitution.**—The secretary of state is charged with the duty of making and executing all contracts, with the approval of the governor, the auditor and the treasurer, required by section 30, of article 4, of the constitution, as follows:

1. The secretary of state shall, from the best information he can obtain, fix a maximum price at which all stationery, paper and fuel, used by the general assembly, or by other departments of the state government, shall be purchased by the state, and a maximum price for all printing, binding and distribution of laws, journals and department reports, printed, bound, or distributed for the state, and also a maximum price for any repairing or furnishing the halls and rooms used for the general assembly, or its committees, which may at any time seem to him to be necessary; and, having so fixed such maximum price, shall, at the times prescribed in section 199, advertise for bids for furnishing such supplies or doing such work for the state, in not less than two, nor more than four newspapers published in this state, one of which to be published at the city of Montgomery, at a price not to exceed the maximum fixed.

2. Such advertisement shall be made for at least three successive weeks, by giving at least one insertion of the same in each week in such papers, inviting sealed proposals for furnishing the proposed materials or work, naming in such advertisement a day after which such bids will close; and immediately after the day named, or as soon thereafter as practicable, the secretary shall open such bids as may have been received for the specified materials or work advertised for, and shall accept the lowest responsible bid for the same below the maximum price, subject to the approval of the governor, the auditor and the treasurer of the state, after the contract has been executed by and between the secretary of state and such accepted bidder.

3. The secretary of state shall, from the best sources of information obtainable, ascertain the probable amount of supplies

needed in any fiscal year, or the probable amount of work or repairs needed for any given time during the term of his office, and contract for same in such quantity and amount as, in his judgment, will be for the best interest of the state; and to this end, he may call on the heads of the other departments of the state government for such estimates of work and materials needed by them, which estimates shall be so furnished when called for.

4. Before any such contract shall be submitted to the governor, auditor and treasurer, for their approval, the contractor shall furnish to the secretary of state bond, with good and sufficient surety, in double the amount involved in such contract, conditioned for the faithful performance of the same, to be approved by him, which bond so approved shall accompany such contract when the same is presented for the approval of the governor, auditor and treasurer, and, when so approved by them, shall be a valid contract; and all such bonds shall be filed in the office of the secretary of state.

5. Whenever requested by the secretary of state, the governor, auditor and treasurer shall meet in the office of the governor, or of the secretary of state, for the purpose of examining any contract made under this section, and each of them shall indorse thereon in writing his approval or disapproval thereof, if the same is accompanied by the bond required by subdivision four of this section.

6. In case the lowest responsible bidder shall fail to execute his contract or give the required bond under this section, then the secretary of state shall award the contract to the next lowest responsible bidder, and in case of a second failure, then the next lowest responsible bidder, and so on until a contract is executed and approved; and in case all the bids are exhausted and no contract concluded, then he may proceed to re-advertise as before, until the object is accomplished.

7. The bid of no member or officer of any department of the state government shall be accepted, nor any bid in which it may be ascertained that any such member or officer is in any way interested; and any such contract, if made, shall be void, and no payment shall be made thereon.

8. The secretary of state must pass upon the compliance of any contract made in pursuance of this section; if he shall find the same to conform, in every respect, to the terms and stipulations of the contract, he shall certify the same, together with the amount due thereon, to the auditor, who shall draw his warrant on the treasurer, in favor of the party entitled thereto, for the amount so certified by the secretary of state.

86 (75). **His Salary.**—The annual salary of the secretary of state is eighteen hundred dollars.

87 (76). **Fees to be charged by him.**—He shall charge the person for whom the service is rendered the following fees: For copying any law, or other matter, where the copy is desired, fifteen cents for every hundred words; for any certificate, and the annexation of the seal of the state, one dollar; for the issue of a patent, seventy-five cents.

88 (77). **His bond.**—The secretary of state must give bond in the sum of ten thousand dollars, to be approved by the governor, and deposited in the office of the auditor.

89 (78). **Custody of books.**—The secretary of state has the charge of all books owned and kept for sale by the state, and it is his duty to sell the same; and he is liable upon his official bond for failure of any of the duties imposed in selling the same, and for failure to pay over the money received therefor.

As amended, Dec. 6, 1878, p. 70.

90 (79). **Files list of books with the governor and makes returns to the auditor.**—He must, at the commencement of his term of office, file in the governor's office a list of such books as come into his possession for sale, and he must, at the end of every quarter of such term, return to the auditor a certified statement showing the number and description of books sold, and the amount of money received therefor at prices fixed upon such books, and pay the same into the treasury for the use of the state.

91 (80). **Duty and liability on expiration of office.**—At the end of his term of office, or his resignation, he must file in the office of the governor a full statement of the books sold and remaining on hand, to be turned over to his successor, and is liable on his bond for failure to comply with the requisitions of this section, and the two preceding sections, and the one subsequent.

92 (81). **Keeps account of sales and money.**—He must keep, in his office, a book, in which shall be entered an account of books sold, and of money paid over.

93 (82). **Preservation of fuel.**—The secretary of state must provide that the fuel of the state, after being delivered, is preserved from waste, and any sum necessary for this purpose must be paid out of any money in the treasury not otherwise appropriated, on the warrant of the auditor, upon account and certificate of the secretary of state that the account is correct and according to contract, and approved by the governor, and that the sum was necessary to protect the state against loss in the waste of fuel.

ARTICLE III.

STATE AUDITOR.

94 (83). **Bond of auditor.**—The auditor must, before entering on the duties of his office, give bond in the sum of twenty thousand dollars, which bond must be approved by the governor, and filed and recorded in the office of the secretary of state.

95 (84). **Seal and its device.**—He must keep a seal with the device, "The State of Alabama, Auditor's office."

96 (85). **His duties.**—It is the duty of the auditor,—

1. To superintend the fiscal affairs of the state, as required by law.

2. To keep and preserve in his office, in suitable books, fair and accurate accounts between this state and the United States, including the two and three per cent. funds, the surplus revenue funds, and the funds arising from the distribution of the sales of the public lands.

3. To keep the accounts in relation to the school fund, and every other special or trust fund in which the state is interested, the keeping of which is not specially entrusted to other officers.

4. To keep an account of all state bonds issued and paid, and of all interest paid.

5. To keep all accounts between the state and the treasurer, charging him with the balance due when he came into office, and with all moneys received by him, and crediting him with all warrants drawn on the state treasury and paid by him.

6. To audit and adjust the accounts of all public officers, keeping a regular account with every person in each county in the state who is by law authorized to collect and receive any part of the state revenue, in suitable books, in which he must charge such persons with all sums of money due from them severally, and credit each with all moneys paid by him to the treasurer, having first certified to that officer the amount or balance due.

7. To examine and adjust the claims of all persons against the state, where provision for the payment thereof has been made by law.

8. To draw warrants on the treasurer for the payment of all moneys directed by law to be paid out of the treasury, in favor of the person authorized to receive the same; stating in such warrant on what account the same is due, and in case of special appropriation, referring to the law under which it is drawn.

9. To direct the forms to be used by all public officers in collecting, keeping the accounts, and making returns of the state revenue.

10. To have printed by the state printer, immediately after each session of the general assembly, all laws in relation to the revenue passed at such session, and to send a copy certified by the secretary of state to each of the tax-assessors tax-collectors, and judges of probate.

11. To take and keep copies of his official letters.

12. To take receipts for all warrants he draws, and to preserve, arrange and file in his office all such receipts, and all accounts by him allowed, with the vouchers and papers relating to the same.

13. To proceed against all defaulters, as required by law.

14. To publish in some newspaper at the seat of government, annually, a list of defaulters to the state, whose accounts have remained due and unpaid for one year, with the amount due from each, how the debt accrued, and when it became due.

15. To keep a docket of all suits brought against defaulters, showing the time when commenced, to what sheriff directed, the sheriff's return, and when and how settled.

16. To examine all bonds for the two per cent. fund, and all other securities for money belonging to the state, kept in his office, from time to time, as to the sufficiency of the securities; and on discovering any deficiency therein, forthwith to report the same to the governor, and to put such bonds or securities in suit when necessary for the collection of the principal and interest.

17. To report in writing to each house of the general assembly, within ten days after the convening of each regular session of the legislature, his views as to the proper subjects of taxation, with such plans and estimates as in his opinion are expedient for using the public money to the best advantage for diminishing the public expenses, and sustaining the credit of the state;

detailed estimates of the expenditures to be defrayed from the treasury for the two ensuing years must accompany the report, and also tables showing in detail the names of all persons in whose favor warrants have been drawn for the preceding two fiscal years, when drawn, under what law in case of special appropriations, and for what amount; the amount of total assessments made in each county for the same years, showing in separate columns the amount of total assessments on each item of taxation, the amount in each county for retail and other licenses, the amount of insolvencies, of commissions, the net amount of revenue paid into the treasury for such years, the condition of the school fund, the two and three per cent. funds, and all other funds, the accounts of which are by law required to be kept in his office.

18. He shall embrace in his report a detailed statement of all payments made from the contingent fund during the two fiscal years, setting forth the date and nature of the claim, and name of the person in whose favor each warrant was drawn, and the same must be printed in connection with his report upon the finances.

19. To condense his report as far as consistent with intelligibility of its material parts, and to have fifteen hundred copies of the same printed for the use of the general assembly as soon as practicable after the close of the fiscal year.

20. To keep a book in which he shall make an entry of the amount of taxes received from each county, and from whom received; and the entries in such book shall be embraced in his biennial report.

21. He must certify under the official seal, at all times, when necessary for the public use, and on application and payment of the legal fees therefor, for private or personal use, copies of any paper required to be kept in his office.

22. To perform such other duties in relation to the fiscal affairs of the state as are, or may be required of him by law.

Timberlake v. Brewer, 59 Ala. 108; Brewer v. Watson, 61 Ala. 310; State v. Brewer, Ib. Ala. 318; State v. Brewer, 62 Ala. 215; State v. Brewer, 64 Ala. 287; Brewer v. Watson, 65 Ala. 88; s. c. 71 Ala. 299.

97 (86). **His salary and fees.**—The annual salary of the auditor shall be eighteen hundred dollars, to be paid in such manner as is now prescribed by law; and he must charge fifty cents for each annexation of his official seal for private or personal use, and for other services the same fees as the secretary of state for similar services.

98 (87). **Office under superintendence of governor.**—The office of the auditor is under the general superintendence of the governor.

As amended, Dec. 12, 1884, p. 87, sec. 1.

99 (88). **Clerks; salary.**—The auditor may employ two clerks in his office, and remove them at pleasure, at an annual salary for each clerk of one thousand five hundred dollars, payable in monthly installments, on the last day of each month, on their sworn accounts, and the certificate of the auditor of their correctness, and the warrant of the auditor on the treasurer.

Ib. secs. 1, 2.

100 (89). **Qualifications and duties of clerks.**—Such clerks must, before entering upon their duties, comply with such requisitions as the auditor may prescribe for his own security,

and take an oath faithfully to discharge all such duties in the auditor's office, and connected with it, as are, or may be confided to them, and also the oath required of public officers.

101 (90). **Official acts.**—The official acts of one of these clerks, to be assigned as chief clerk by the auditor, shall be presumed to be by the authority of, and shall be taken as done by the auditor, who shall be responsible for the same. Ib. sec. 3.

102 (91). **Duration of appointment.**—The appointment of such clerks shall not be for a longer time than two years, and shall not continue longer than the incumbent making the appointment remains in office. Ib. sec. 4.

103 (92). **Auditor to keep bonds approved by the governor.**—The auditor must keep all bonds approved by the governor, and place them in his iron safe or vault for safe keeping.

104 (93). **May require proof of correctness of claim.** The auditor has authority to require information on oath, to be by him administered, from any person, touching any claim or account he is required to audit.

105 (94). **Evidence preliminary to payment from contingent fund.**—No money shall be paid out of the contingent fund, except upon account stated, setting forth the items upon which payment is claimed, signed by the proper party, with such authentication as the governor may require of the correctness of the same.

106 (95.) **Register of bonds in office.**—All bonds of the state, redeemed or paid, must be registered in the auditor's office.

107 (96). **Must not draw warrant in favor of defaulter.** He must not give any public defaulter any warrant for moneys due him from the state, except the balance which is due after the application of the amount due from the state to the extinguishment of the debt, interest and damages, if any are given by law, due from such defaulter.

State v. Brewer, 62 Ala. 215.

108 (97). **Not to receive revenue unless expressly authorized.**—The auditor has no authority, in any suit or proceeding by him commenced or directed, or in any other case, unless such authority is expressly given, to receive any of the state revenue.

109 (98). **Accounts against state to be itemized and verified.**—All accounts against the state must be accurately and fully itemized, and accompanied with the affidavit of the party, stating the correctness of the same, and that no portion of such account has been paid.

110 (99). **Verification of claims against the state.**—No claim against the state must be allowed, or ordered to be paid by the legislature, until satisfactory evidence is produced, by affidavit duly administered and authenticated, that the same is justly due and unpaid; and such affidavits must be filed with the secretary of state at the close of each session.

111 (100). **When required to issue duplicate warrants.** The auditor must issue duplicate warrants upon the treasury, whenever he is satisfied that the original warrant has been destroyed or lost; and the party holding the duplicate shall have the same right as if he held the original, and the treasurer is authorized to pay the same.

112 (355). **Fiscal year.**—The fiscal year ends on the thirtieth day of September.

113 (356). **Account to be published.**—A regular account of receipts and expenditures of all public money must be published annually in two papers at the seat of government, and the account paid by warrant of the auditor on the state treasury.

ARTICLE IV.

STATE TREASURER.

114 (101). **Treasurer's bond.**—The state treasurer, before entering upon the duties of his office, must give bond in the sum of two hundred and fifty thousand dollars, with two or more sufficient sureties, to be approved by the governor, and recorded in the office of the secretary of state, and filed and kept in the office of the auditor.

115 (102). **Settlement of accounts and delivery of books, etc., on removal or resignation.**—If the state treasurer resigns, or is removed, he must, within ten days after such resignation or removal, state his account, and deliver the books, papers and money belonging to the treasury to his successor, taking his receipt therefor; and the auditor must record and file in his office a statement of such settlement and receipt, and report the same to the next session of the general assembly.

116 (103). **When auditor to state accounts, etc.**—If the treasurer, in the event of his resignation or removal, within ten days thereafter, fails to comply with the provisions of the preceding section, or if he dies or absconds, the auditor, after giving ten days' notice, by publication in some newspaper at the seat of government, must proceed, in the presence of any person attending on the part of such late treasurer, to state his account, and deliver the books, papers and moneys belonging to the treasury to his successor, taking his receipt for the same; to record and file such receipt and statement, and report the same to the next general assembly.

117 (104). **Governor has superintendence of office.**—The governor exercises a general superintendence over the office of state treasurer.

118 (105). **His salary.**—The annual salary of the state treasurer is two thousand one hundred dollars.

119 (106). **Custodian of state bonds redeemed, and duties in reference to them.**—The treasurer is the custodian of all redeemed bonds and paid coupons of the state, which must be canceled; and he must register them in a book kept for that purpose, in such manner as to show a full and complete identification by date, number, amount, rate of interest, time, and place of payment, and by whom issued, and such registry must be carefully preserved; and all bonds of the state, redeemed or paid, must be canceled and filed in the office of the treasurer.

120 (107). **Duties of treasurer.**—It is the duty of the state treasurer,—

1. To receive and keep the moneys of the state.

2. To pay all warrants drawn under authority of law by the auditor on the treasurer, and to pay no money out of the treasury except on the warrant of the auditor.

3. To take receipts for all payments.

4. To file such receipts and warrants, and to number the same in chronological order, for each fiscal year.

5. To keep accounts of the receipts and expenditures of the public money.

6. To enter in his books the amount of money he receives for taxes, licenses, or on any other account for the state, so that the net proceeds of the whole revenue, as well as every branch thereof, and the amount of disbursements distinctly appear.

7. To give information in writing to the general assembly, or either house thereof, or to the governor, when required, reporting all matters appertaining to his office.

8. To report in writing to each house of the general assembly, during the second week of the regular session, the amount paid into the treasury for the preceding fiscal year, showing the amount paid in by each county, and distinguishing such counties as have made partial payments from those which have paid in full; also statements of all sums of money he has paid out on account of the state for such years, specifying the amount, to whom paid, and for what, with an exact statement of the balance in the treasury.

9. To condense his report, as far as is consistent with intelligibility of its material parts, and to have fifteen hundred copies of the same printed for the use of the general assembly, as soon as possible after the close of the fiscal year.

10. To act as agent for the state, to receive the whole or any portion of the two or three per cent. fund, and to give on the part of the state his receipt therefor.

11. To perform such other duties in relation to the fiscal affairs of the state as are, or may be by law required of him.

121. Fiscal agency in New York for payment of interest. Jan. 22, 1885, p. 89, sec. 1.
For the purpose of paying the interest on the bonded indebtedness of the state, which is payable in the city of New York, the treasurer, with the written approval of the governor, shall, from time to time, as he may see fit, designate some well known, responsible, solvent bank or banking house in such city, at which such interest will be paid.

122. Money for payment of interest, how drawn.—Not less than one nor more than two months before the first days of January and July of each year, the treasurer must certify to the governor the amount of money which will probably be needed to pay the interest on the bonded indebtedness of the state falling due next thereafter, and payable in the city of New York, and at the treasury of the state; and the governor shall thereupon, in writing, direct the auditor to draw his warrant on the treasury in favor of the treasurer for such amount, or so much thereof as the treasurer may deem necessary, to be paid out of any fund appropriated for the payment of interest on such indebtedness; and upon the receipt of such warrant, the treasurer shall enter the amount thereof, on the appropriate books of his office, to the credit of "Interest Account," and shall thereafter, from time to time, debit such account with amounts Ib. sec. 2.

paid on such interest at the treasury, and at the fiscal agency provided for in the preceding section, and for the expenses necessarily incurred in providing for the payment of such interest. But no money shall be drawn out of the treasury to pay such interest prior to ten days before the same falls due.

Ib. sec. 3. **123. How money sent to fiscal agency.**—The money to pay the interest on such bonded indebtedness, which is to be paid in the city of New York, shall be by the treasurer remitted by express to the fiscal agency in such city, without taking out special insurance, except in cases where the governor in writing directs such insurance to be taken out.

Ib. sec. 4. **124. Payment of interest in New York.**—It is the duty of the fiscal agent in the city New York to pay the interest on the bonded indebtedness of the state, upon presentation of the proper coupons and checks, and, upon payment, to immediately cancel such coupons and checks, and to forward the same to the treasurer by express, or otherwise, as he may direct.

Ib. sec. 5. **125. When treasurer not liable for loss in providing for payment of interest.**—The treasurer shall not be liable for any loss or damage sustained by the state in carrying out the provisions of the four preceding sections, which does not result from any fault or negligence on his part.

ARTICLE V.

ATTORNEY-GENERAL.

126 (108). **His bond.**—The attorney-general, before entering upon the duties of his office, must give bond in the sum of ten thousand dollars, and, upon requisition of the governor, must give additional bond whenever the public interest demands. His bond must be approved by the governor, and recorded in the office of the secretary of state, and filed in the office of the auditor.

127 (109). **His duties.**—He shall keep his office at the seat of government, and perform the following duties, viz.:

1. He must give his opinion in writing, or otherwise, on any question of law connected with the interests of the state, or with the duties of any of the departments, when required by the governor, secretary of state, auditor, treasurer, or superintendent of education, in writing to do so; and he shall also give his opinion to the chairman of the judiciary committee of either house, when required, upon any matter under the consideration of the committee.

2. He must, on the application of the governor, prepare all contracts and writings in relation to any matter in which the state is interested.

3. He must attend, on the part of the state, to all criminal cases pending in the supreme court, and to all civil suits in which the state is a party in the same court. He shall also attend to all causes other than criminal that may be pending in the courts of Montgomery county, in which the state may be in any manner concerned; and when required to do so by the governor, in writing, shall appear in the courts of other states, or of the United States, in any cause in which the state may be interested in the result.

4. He must superintend the collection of all notes for school lands which may be turned over to him by the superintendent of education; and for this purpose may appoint agents in different parts of the state.

5. He must annually, in the month of November, make to the governor a report, consolidated from the reports made to him by the solicitors of the different judicial circuits, stating the number of persons prosecuted under indictments during the past year in each county, the character of the alleged offenses, the results of the trials, and the punishments imposed; together with such suggestions, tending to the suppression of crime, as he may deem proper.

128 (110). **His salary.**—The salary of the attorney-general shall be fifteen hundred dollars per annum, payable in monthly installments, on the last day of each month.

ARTICLE VI.

DEPARTMENT OF AGRICULTURE.

129. Department of agriculture.—A department of agriculture is created and established, under the management and control of a public officer to be known as the "Commissioner of Agriculture," who must be a practical and experienced agriculturalist. Feb. 17, 1885, p. 168, sec. 2.

130. Appointment of commissioner, and term of office. The commissioner of agriculture is appointed by the governor, and holds office for the term of two years, and until his successor is appointed and qualified. Ib. sec. 2.

131. Oath of office; bond.—The commissioner, before entering on the duties of the office, must take and subscribe the oath of office prescribed by the constitution; and must enter into bond, payable to the State of Alabama, with at least two good and sufficient sureties, in the penalty of five thousand dollars, with condition for the faithful performance of all the duties which are, or may be by law required of him. The bond must be approved by the governor, and, with the oath of office, filed in the office of the auditor. Ib. sec 2.

132. Salary.—The salary of the commissioner is twenty-one hundred dollars annually, payable monthly. Ib. sec. 2.

133. Location of office.—The commissioner must keep his office in the state capitol.

134. Clerks; oaths of office; bonds; term of office.—The commissioner must appoint two clerks, one of whom shall be known as the chief clerk, the other as assistant clerk; each of them must take an oath to discharge faithfully all the duties which are, or may be required of him by law. The chief clerk must give bond, with at least two good and sufficient sureties, to be approved by the commissioner and the governor, in the penalty of five thousand dollars, payable to the State of Alabama, with condition for the faithful performance of all the duties which are, or may be required of him by law. The assistant clerk must give bond, with at least two good and sufficient sureties, to be approved by the commissioner and the governor, in the penalty of three thousand dollars, payable to the Ib. secs. 2, 3.

State of Alabama, with condition for the faithful performance of all the duties which are, or may be required of him by law. The official oaths and bonds of the chief clerk and assistant clerk must be filed in the office of the auditor. The chief clerk and assistant clerk hold office during the term of the commissioner by whom they are appointed, and until the appointment and qualification of their successors, unless sooner removed.

Ib. secs. 3, 19. **135. Duties of clerks.**—The clerks must discharge such duties as may be prescribed by the commissioner. It is the duty of the chief clerk to take charge of the "fertilizer tags" of the department; to furnish the same to dealers, and to make such reports as may be required by the commissioner; under the supervision of the commissioner, to make sale of the tags to licensees; to keep a correct account of all tags sold by the department, showing to whom and when sold, and, as far as practicable, the fertilizer or fertilizers for which they are intended; and to keep an account of all licenses issued by the commissioner, to whom and when issued, and of the fees received therefor; and, under the direction of the commissioner, to render monthly accounts to the auditor of all moneys received by the department, and of all its expenditures; and to pay into the state treasury such moneys as are properly payable thereto, on the warrant of the auditor.

Ib. sec. 3. **136. Compensation of clerks.**—The annual salary of the chief clerk is fifteen hundred dollars, and of the assistant clerk twelve hundred dollars, payable monthly on the certificate of the commissioner. Expenses necessarily incurred by them in traveling on the business of the department, under the direction of the commissioner, must be paid from, and charged against the department fund.

Ib. sec. 4. **137. Duties of commissioner.**—The following are the duties of the commissioner:

1. He shall encourage the proper development of agriculture, horticulture and kindred industries.

2. He shall encourage the organization of neighborhood and county agricultural clubs and associations, and out of these the organization of a state agricultural association.

3. He shall collect and publish statistics, and such other information in regard to the industries of this state, and of other states, as may be of benefit in developing the agricultural resources of the state. To this end, he shall put himself in communication, and shall co-operate with the departments of agriculture in other states, and with the commissioner of agriculture of the United States, and shall provide for the proper and careful distribution of all seeds, plants, documents and information coming into his possession on account of the department, that may be of interest and benefit to the people of the state; and he may purchase seeds for distribution.

4. He shall cause to be investigated the diseases of grain, fruits and other crops growing in this state, and also remedies for such diseases, and also the habits and propagation of the various insects that are injurious to the crops of the state, and the proper mode of their destruction.

5. He shall investigate the subject of grasses, and report upon their value, and the cultivation of the varieties best adapted to the different sections of the state, and the mode of preserving the same.

6. He shall inquire into all matters connected with the dairy that he may deem of interest to the people of the state, and in this connection the raising of stock and poultry, the obtaining of such as are of the most value, and the breeding and propagation of the same; and shall encourage the raising of fish and the culture of bees.

7. He shall give attention to the subject of fencing, and the reduction of the cost thereof; and shall investigate the subject of subsoil drainage, and the best modes of effecting it; and of irrigation, and what portion of the state can be most benefited thereby.

8. He shall investigate and report upon the culture of wool, and the utility and profits of sheep-raising; also the culture of silk, and its manufacture and preparation for market.

9. He shall cause a proper collection of agricultural statistics to be made annually, and to this end, shall furnish blank forms to the tax-assessor, or some other county official of each county; and it is made the special duty of the tax-assessor, or other officer to whom such blanks are furnished, to collect such information as may be desired, and report the same without delay to the commissioner.

10. He shall appoint county correspondents, who will report to him from time to time, as may be desired.

11. He shall prepare and keep in his office books of registry, wherein any person may have entered, upon payment of a registry fee of one dollar for each tract or lot, any real estate for sale, with the terms of sale; and shall file in his office any plats, or descriptive papers desired; and such books, plats and papers shall be open to inspection, free of charge. He shall also obtain from the auditor, and keep in his office, the registry of the lands which may be held by the state for sale for non-payment of taxes, or for other cause, with their value, and the nature and characteristics of the soil.

12. He shall collect specimens of wood, suitable for manufacturing and other purposes, and specimens of agricultural, mineral, phosphate and marl deposits of the state, and cause correct analysis of such as may be deemed expedient to be made and recorded in a substantial book to be kept for this purpose.

13. He shall also, as soon as practicable, prepare a convenient hand-book, with the necessary illustrative maps, which shall contain all necessary information, as to the mines, minerals, forests, soils, and other products, climate, water, and water powers; fisheries, mountains, streams, industries, and all such statistics as are best adapted to give proper information of the attractions and advantages which the state affords to immigrants, and shall make illustrative expositions thereof, whenever practicable, at international and state expositions.

14. He shall aid immigration by publishing each year such information as to the agricultural, mineral and other industries and resources of the state, as shall be of interest to immigrants, or others, seeking a change of home, or seeking investments.

Ib. sec. 6. 15. He shall, at the opening of each season, issue and distribute circulars, setting forth the brands of fertilizers, sold or exchanged, or offered for sale or exchange in the state, their analysis as claimed by the manufacturer or dealer in them, and, so far as known, their agricultural and commercial value.

Ib. sec. 27. 16. He shall issue a license to such persons as propose to sell or exchange fertilizers.

Ib, sec 9. 17. He shall cause tags of suitable material to be prepared with proper fastenings for attachment to bags, barrels, or packages of fertilizers, and there shall be printed thereon the word "guaranteed," with the year or season in which they are to be used, and a fac simile of his signature.

Ib. sec. 13. 18. He may, at his discretion, obtain a sample of all fertilizers sold or exchanged, or offered for sale or exchange, in this state, cause them to be analyzed by the state chemist, and make publication of the analysis.

Ib. sec. 17. 19. He shall make and publish such rules and regulations as he may deem necessary to carry into effect the provisions of this article touching the sale or exchange of fertilizers.

Ib. sec. 22. 20. He shall make a report to the governor, quarterly, of all the moneys received and disbursed by the department; and, on the expiration of the fiscal year, must make a report of all such receipts and disbursements.

Ib. sec. 5. **138. State geologist to furnish information to the commissioner.**—It is the duty of the state geologist, on application, to furnish the commissioner all the information he may have, with reference to the mineral, agricultural, and other natural resources of the state, together with the analysis of soils, ores, marls, minerals and mineral waters, and with maps, charts, drawings and specimens, illustrative of the geological, agricultural and mineral features of the state.

Ib. secs. 27, 28. **139. Sale or exchange of commercial fertilizers.**—Commercial fertilizers must not be sold or exchanged without a license from the commissioner, authorizing the person making the sale or exchange to deal therein. All sales or exchanges made without such license are void.

Ib. sec. 27. **140. License.**—On the payment of a fee of one dollar, the commissioner must issue license to any person or firm, or corporation, or association of persons, authorizing the sale or exchange of fertilizers during a season, expiring on the thirtieth day of September of each year.

Ib. secs. 9, 10. **141. Tags to be supplied licensee.**—The commissioner must furnish the licensee, on application, tags to be attached to fertilizers sold or exchanged, of the kind and description he is required by subdivision seventeen of section 137 to prepare, on the payment to him of fifty cents, for a number sufficient to tag a ton of fertilizers. Before selling or exchanging, or offering to sell or exchange fertilizers, the licensee must attach one of the tags to each bag, barrel, or package thereof; and a sale or exchange of fertilizers, not so tagged, is void.

Ib, sec. 7. **142. Fertilizers to be submitted to commissioner.**—Before offering a fertilizer for sale or exchange, the person proposing to sell or exchange must submit to the commissioner a written or printed statement, setting forth,—

1. The name and brand under which such fertilizer is to be sold or exchanged, the number of pounds contained in the bag,

barrel, or package, in which it is to be put upon the market, the name or names of the manufacturers, and the place of manufacturing.

2. A statement setting forth the amount of the named ingredients which they are willing to guarantee such fertilizer to contain: First, nitrogen; second, water soluble phosphoric acid; third, citrate soluble phosphoric acid; fourth, acid soluble phosphoric acid; fifth, potash; and such statement shall be held to constitute a guarantee to the purchaser that every package of such fertilizer contains not less than the amount of each ingredient set forth in the statement, and when such statement sets forth the maximum and the minimum of any ingredient, the commercial value shall be estimated upon the minimum alone; but this shall not preclude the party from setting forth any other ingredients which the fertilizer may contain, which, as well as the preceding, shall be embraced in the guarantee.

143. Fertilizers or chemicals for manufacturing to be branded.—All fertilizers, or chemicals for manufacturing or composting the same, offered for sale, exchange, or distribution, must have branded upon, or attached to each bag, barrel, or package, in such manner as the commissioner may by regulation establish, the true analysis of such fertilizer or chemical, as claimed by the manufacturer, showing the percentage of valuable elements or ingredients such fertilizer or chemical contains; and in every case the brand must specifically set forth the percentage contained in the fertilizer or chemical of the several ingredients specified in section 142, in the terms of that section. Ib. sec. 12.

144. Fertilizer; what included in term.—The term "fertilizer," or "commercial fertilizer," as used in this article, does not include common lime, land plaster, cotton seed, cotton seed meal, ashes, or common salt, not in combination. Ib. sec. 24.

145. Chemist of department.—The professor of chemistry of the Agricultural and Mechanical College is the official chemist of the department. On the application of the commissioner, he must analyze and certify the analysis of all fertilizers, samples of which are furnished him; and, at the request of the commissioner, if he can without conflict with his duties as professor, must attend conventions of agricultural chemists, make reports of such matters as he may deem of interest to the department, and render such other services in the line of his profession as the commissioner may require. Ib. sec. 26.

146. Compensation of chemist.—The chemist is entitled to such compensation as the commissioner may deem reasonable, not exceeding five hundred dollars annually; and also to his necessary traveling expenses, while on duty assigned to him by the commissioner; payable from the funds of the department, on the certificate of the commissioner. Ib. sec. 26.

147. Copy of official analysis, evidence.—The copy of the official analysis of any fertilizer or chemical, under the seal of the department of agriculture, shall be admissible as evidence in any of the courts of this state, on the trial of any issue involving the merits of such fertilizer or chemical. Ib. sec. 15.

148. Funds of department.—All moneys received by the department from fees for licenses, from sales of tags, from fees for the registration of lands for sale, or from any other source, must, Ib. sec. 18.

except as is herein otherwise provided, be paid into the state treasury monthly; and such moneys must be, by the auditor and treasurer, entered on the books of their respective offices to the credit of the department of agriculture.

Ib. secs. 22, 29.

149. Expenses of department.—The commissioner must submit, monthly, to the governor an account of the expenses of the department for the preceding month, and an estimate of the expenses for the succeeding month, and, with the approval of the governor indorsed on such estimate, may retain from the moneys received a sum not exceeding five hundred dollars, to meet such expenses, not including the salary of the commissioner; such estimate, with the approval of the governor, to be filed in the office of the auditor. The traveling expenses of the commissioner, of the clerks, of the chemist, an account thereof being verified, may be paid from the money so retained.

Ib. sec. 21.

150. Experiment stations.—The trustees of the Agricultural and Mechanical College may establish and maintain an agricultural experiment station, at which careful experiments in scientific agriculture shall be made; the results whereof shall be furnished the commissioner monthly, and he shall make publication thereof as often as he may deem necessary; and, if such station is established and maintained, and the trustees of the college shall cause, without charge therefor, an analysis to be made of all fertilizers submitted by the commissioner for analysis, on the approval and warrant of the governor, one-third of the net proceeds of all fertilizer tags sold by the department shall be paid annually, at the close of the fiscal year, to the president of the board of trustees, to be disbursed by the board in maintaining such experiment station.

Feb. 17, 1885, p. 144, sec. 1.

151. Branch agricultural experiment station.—A branch agricultural experiment station, for the purpose of conducting and making experiments in scientific agriculture, is established and located at or near Uniontown, in Perry county.

Ib. sec. 2.

152. Board of control.—The station is under the general supervision and control of a board of control composed of the commissioner of agriculture, the director of the experiment station at the Agricultural and Mechanical College, and three persons engaged in the cultivation of canebrake lands, to be appointed by the governor; the members of such board must not receive any compensation other than expenses actually incurred in visiting the station, and while there supervising its affairs.

Ib. secs. 4, 5.

153. Authority of board.—The board has authority to purchase suitable lands, not exceeding in quantity forty acres, for the uses of the station, taking the title to the state, and to construct thereon the necessary buildings and other improvements, not expending more than two thousand dollars in making such purchase, and in the construction of such buildings and improvements. The board has authority also to appoint and to discharge at pleasure such officers, agents, or servants, as are deemed necessary to the operation of the station, fixing their compensation; and may appoint a director to conduct and control the operations of the station, under the superintendence and direction, and subject to the rules and regulations of the board.

154. Duties of board.—The board must cause such experiments to be made at the station as will advance the interests of scientific agriculture, particularly on canebrake lands, and to cause such chemical analyses to be made as are deemed neccessary; all such analyses, if requested, to be made, under the supervision of the commissioner of agriculture, by the chemist of the agricultural department without charge. Ib. sec. 3.

155. Expenses of station.—The expenses of the station, not exceeding fifteen hundred dollars annually, must be paid by the commissioner of agriculture, on the order of the board of control from the moneys of the department of agriculture.* Ib. sec. 6.

ARTICLE VII.

THE MILITARY. †

156. The governor commander-in-chief of Alabama state troops.—The volunteer military forces of the state shall be known and designated as the Alabama State Troops, and the governor is the commander-in-chief thereof. March 1, 1881, p. 103, secs. 1, 2.

157. The staff.—The staff of the governor consists of the following officers, to be appointed by him and commissioned as officers of the Alabama state troops, holding office at his pleasure: One adjutant-general, one inspector-general, one judge-advocate-general, one quartermaster-general, one surgeon-general, one commissary-general, one paymaster-general, each with the rank of colonel, an assistant adjutant-general and four aides-de-camp with the rank of lieutenant-colonel. Ib. sec. 2.

158. Duties of the adjutant-general.—The adjutant-general is chief-of-staff to the governor. He shall preserve the arms, accoutrements, and other military stores of the state, and distribute them to the state troops, at the expense of the state; keep a roster of all the officers of the Alabama state troops, and keep on file in his office all reports made to him. He shall, as often as may be necessary, cause so much of the militia laws and laws relating to the volunteer forces of the state as may be in force, to be printed, bound, and distributed, a copy to each Ib. sec. 3.

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* On the 16th of February, 1887, "An act to amend an act to establish a branch agricultural experiment station in the canebrake," was approved, which is as follows:

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the name of said station shall be the Canebrake Agricultural Experiment Station.

SECTION 2. That the board of control of said station shall be composed of the commissioner of agriculture and the director of the experiment station at the Agricultural and Mechanical College, and five progressive farmers who are actually engaged in cultivating canebrake lands, three of whom must reside within ten miles of the station.

SECTION 3. That said board of control shall have the power to pay the director a reasonable salary for his supervision of said station, not to exceed the sum of two hundred and fifty dollars.

SECTION 4. For the better equipment of said station, and to add necessary buildings and other improvements to said station, there is hereby appropriated, out of the fund of the agricultural department in the treasury, the sum of three thousand dollars; and for the purpose of enabling said station to employ a competent assistant director, there is hereby appropriated, annually, the sum of twenty-five hundred dollars to defray the expenses of said station; and the annual appropriation shall be paid quarterly to the treasurer of said station.

† Rewritten by joint committee.

commissioned officer, and prepare and publish all necessary blank-books, forms, notices and stationery, and furnish them to the state troops at the expense of the state; and the auditor shall draw a warrant on the treasurer therefor. The adjutant-general shall perform such other duties as may be required of him by the commander-in-chief. The assistant adjutant-general shall assist the adjutant-general, and, in his absence, perform all his duties. The several staff officers shall perform the same duties, as nearly as the circumstances of the case will permit, as are performed by the staff officers of like rank in the United States army, and any and all such other duties as may be required of them by the commander-in-chief.

Ib. sec. 27.

159. Arms; ordnance-sergeant.—The governor shall, whenever necessary, designate a depository for the undistributed military property of the state, and appoint a competent person as ordnance-sergeant, to hold office at the pleasure of the governor, and to be subject to the orders of the adjutant-general, whose duty it is to keep such property in serviceable order, and to have mended, at the expense of the state, such small arms and property of the state as may be sent, at the expense of the state, to the depository for repair, and shall act as clerk of the adjutant-general, and perform such other duties as the adjutant-general may direct. The ordnance-sergeant shall receive a salary of not less than twenty-five, nor more than fifty dollars a month, at the discretion of the governor, to be paid monthly, and shall execute a bond in the sum of one thousand dollars, payable to the state, for the faithful performance of his duties, to be approved by the adjutant-general, and renewable at his discretion.

Feb. 17, 1885, p. 156.

160. Arms issued to military institutes.—The governor may, in his discretion, issue public arms and equipments received from the United States to chartered institutions of learning which adopt a military system, upon bond, with sureties, for the preservation and return thereof when called for by him, and upon such terms as he may require.

March 1, 1881, p. 103, sec. 29.

161. Using state military property without right.—Any person who sells, purchases, or retains in his possession or control without right any military property belonging to the state, and refuses, after demand of any officer entitled thereto, to deliver the same, is liable to suit by such officer for its recovery; and any commanding officer may take possession of such property wherever it may be found.

Ib. secs. 4, 5, 31.

162. Organization of a company.—Upon the petition of forty or more men liable to military duty, addressed to the adjutant-general, setting forth the residence of the petitioners, and that they desire to form a military company, and to be mustered into the military service of the state, the governor may, in his discretion, order any officer of the state troops to organize the company and muster it into service, and then to superintend an election by ballot, at a time and place such officer may select, of the following commissioned officers: For each infantry or cavalry company, one captain, one first and one second lieutenant; for each artillery company, one captain, two first lieutenants, and one second lieutenant; who shall hold office for three years, and until their successors are qualified. After such election each officer must take and subscribe an

oath that he will faithfully discharge the duties of his office, and will obey and observe the constitution of the United States, and of the state, and will promptly execute and obey all lawful orders of his superior officers, and will enforce, as far as in his power lies, strict discipline in his command, which oath may be administered by any officer of the Alabama state troops, or by any civil officer authorized to administer an oath, without any charge or fee for administering the oath. The commanding officer shall forthwith appoint, from the members of the company, four sergeants and four corporals, and if the company is an artillery company, four sergeants and eight corporals, or more, if authorized by the governor. As soon as said company is assigned to a regiment, as hereinafter provided, said non-commissioned officers shall receive a certificate or warrant of his rank, signed by the colonel and countersigned by the adjutant; but a warrant will not be given to a first sergeant as such. Blank warrants must be furnished from the adjutant-general's office. Such warrants may be canceled by the order of the commanding officer of the regiment, when, in his judgment, the good of the service requires it, and in all cases, upon the application of the commander of the company. Immediately upon the completion of the organization of the company, as herein provided, the officer appointed to superintend such organization shall make to the adjutant-general such report as the adjutant-general may require, accompanied with the oaths of office of the officers sworn in by him; and thereupon, the governor may, in his discretion, issue to such officers a commission; but no fee of any description shall be charged for the issuance of a commission to any officer of the Alabama state troops.

163. Number in company; term.—No company organized under this article shall number less than forty, nor more than one hundred, including officers and men, excepting artillery and cavalry companies, which may number not more than one hundred and twenty, officers and men. The term of enlistment shall be three years, unless sooner discharged. The company may increase its number by enlistment to the maximum named. Ib. secs. 4, 5.

164. Issue of arms.—After a company is duly organized, it must be assigned to one of the regiments of state troops, and its officers commissioned; and the adjutant-general shall, from the undistributed arms of the state, issue to the commanding officer of the company, at the expense of the state, upon his giving satisfactory bond for the safe custody and return thereof, suitable arms and equipments and camp equipage, and may prescribe, by general or special order, rules for the use and preservation thereof. Ib. sec. 6.

165. When no liability for loss.—No commissioned officer, giving bond for the safe keeping of arms or other public property, is liable for loss by fire, riot, or insurrection, or other casualty of the service, unless held liable by a board of survey, to be appointed by, and whose finding is approved by the governor. Ib. sec. 33.

166. Junior second lieutenant.—The governor may, in his discretion, authorize any company of the Alabama state troops Acts, 1884-5, p. 835.

to elect, in addition to the other commissioned officers, an additional second lieutenant, who shall be elected, commissioned and qualified as in the case of other commissioned officers.

March 1, 1881, p. 103, sec. 14.

167. Election of commissioned officers; vacancy.—The members of each company shall, every three years, elect by ballot commissioned officers, to hold office for the ensuing three years, and until their successors are duly qualified. Any vacancy shall be filled by like election, and the officer elected to fill the vacancy shall hold office for the unexpired term, and until his successor is duly qualified.

Ib. sec. 18.

168. Staff.—The colonel of a regiment shall appoint the commissioned and non-commissioned staff thereof, viz.: An adjutant, chaplain, quartermaster, commissary and surgeon, each with the rank of captain, and an assistant surgeon with the rank of first lieutenant; and the non-commissioned staff, viz.: A sergeant-major, quartermaster-sergeant, commissary-sergeant, ordnance-sergeant, and hospital steward, who shall hold office subject to the pleasure of the colonel. All regimental staff officers, entitled to commissions, shall be commissioned, as in case of other commissioned officers, upon the certificate of appointment from the colonel, and hold office for the term of the officer making the appointment, and until their successors are qualified. And the colonel may also detail color-sergeants and general guides, or, in his discretion, may appoint such sergeants and guides.

169. Adjutant-general reports to governor.—The adjutant-general must, ten days before each session of the general assembly, report to the governor the number and condition of the state troops, and of the public arms and accoutrements of the state.

Ib. sec. 19.

170. Uniform.—The uniform of all staff officers, field officers, and non-commissioned staff officers, shall be that prescribed in the United States army regulations. The fatigue uniform of all officers and men shall be that prescribed for the army of the United States; but companies now in the service of the state shall be allowed to retain the fatigue uniforms now owned by them, but when such companies purchase new fatigue uniforms, they shall be as prescribed for the United States army. Any company may adopt and wear (except when in active service, and then by permission of the regimental commander) a dress uniform of its own selection.

Ib. sec. 19.

171. No person can enlist in another command.—No non-commissioned officer, or private, unless duly discharged, can leave his company, and enlist in another, without a transfer, approved by the commanding officer of the regiment. Each company may adopt such rules as to the admission of members as it deems best.

Ib. sec. 7.

172. Tactics.—The Alabama state troops shall adopt and use the same tactics and regulations as may be in use from time to time in the United States army; except as such regulations may by changed by general or special orders of the commander-in-chief, or may be inapplicable.

Ib. secs. 25, 15.

173. Insignia of rank.—The insignia of rank of officers shall be the same as that of officers of corresponding rank in the United States army. Whenever an officer is elected or ap-

pointed as his own successor, he ranks from the date of his original commission, which shall be extended by indorsement of the adjutant-general.

174. Exemption from jury duty.—Every officer, commissioned or non-commissioned, musician and private of the Alabama state troops, is exempt from jury duty during his membership; and the commanding officer of each company shall furnish each member of his command with a certificate of membership, signed by such commanding officer, which shall prove such exemption in any court; but such certificate shall be revoked whenever the holder is absent from four successive drills or parades, without good excuse. The commanding officer of a regiment shall furnish such certificate to all field and staff officers of the regiment, and non-commissioned staff officers and regimental musicians. Ib. sec. 30.

175. Allowance; how drawn.—In commutation of the expense which each active company of the Alabama state troops bears in providing drill rooms and a place for the safe keeping of arms and ammunition and in defraying other necessary expenses, there shall be allowed to the commanding officer of each company, for its use, the sum of sixteen dollars and sixty-six and two-thirds cents per month, payable quarterly, if the company number at least twenty-five uniformed privates and non-commissioned officers, has such parades and drills, at which not less than twenty-five, rank and file, attend, as the governor may prescribe in general orders, not less than one public or private drill a month, and otherwise keep in such state of efficiency as the governor may deem necessary to constitute an active military organization. To secure such allowance for any quarter, the commanding officer must make affidavit before any officer authorized to administer oaths, that his company, during the time for which the allowance is claimed, had the number of drills and parades required, with the number of men prescribed herein, and was during such period an active and efficient military organization. Such claim so verified shall be forwarded to the commanding officer of the regiment to which the company is attached, and by him to the adjutant-general, with such recommendation as he deems proper. The adjutant-general shall forward the claim to the governor with such recommendation as he deems proper. If satisfied that it is just, the governor shall approve the same, and direct the auditor to draw his warrant for such amount in favor of the commanding officer of the company.* Feb. 23, 1883, p. 148.

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*The provision of the statute incorporated in this section was amended by act approved February 28th, 1887 (Pamph. Acts 1886–7, p. 83), as follows: "That in commutation of the expense which each active and uniformed company of Alabama state troops, attached to a regiment, now or may hereafter be, or in providing drill-rooms and a safe place for keeping arms, ammunition and defraying other necessary expenses of such organization, there shall be allowed and paid to the commanding officer of each such company, for its use, the sum of sixteen dollars and sixty-six and two-thirds cents per month, payable quarterly, in the manner hereinafter provided. No company shall be entitled to the benefit of this section, unless it numbers at least twenty-five uniformed and efficient privates and non-commissioned officers, and has such number of parades and drills, not less than one public or private drill, in uniform, a month, at which not less than twenty-five rank and file attend, as the governor may, from time to time, prescribe in general orders, and otherwise keep in such a state of efficiency as the governor may deem necessary to constitute an active and efficient military organization. When-

March 1, 1883, p. 103, sec. 22.

176. Pay in active service.—All officers of the Alabama state troops, ordered into the service of the state to aid in the enforcement of the laws thereof, shall receive one-half of the pay and allowance to which officers of like rank in the United States army are entitled by law to receive, and non-commissioned officers and privates shall receive double the pay, and the same allowances, provided by law for the same rank of non-commissioned officers and men in the United States army.

Ib. 96.

177. Preservation of order when in active service.—The commanding officer of troops in camp, or in other active service, may establish a guard-house. In such guard-house he may incarcerate any non-commissioned officer or private, or any commissioned officer, refusing to submit to arrest, and any civilian guilty of drunkenness, breach of the peace, disorderly conduct, in camp, or within one-eighth of a mile thereof. The commanding officer may cause the removal from the camp, and grounds within one-eighth of a mile of its boundary, of any drunk or disorderly, or any disreputable person. If such person return to such limits without the permission of the commanding officer, or if he resists removal, he may be confined in the guard-house until he submits to leave, or may be turned over to a civil officer. The commanding officer shall prevent the sale or giving away of spirituous, vinous, or malt liquor within the camp, or one-eighth of a mile thereof. He may use the whole force at his command for the proper police of his camp and the enforcement of order and discipline.

Ib. sec. 21.

178. Encampments.—The governor may annually order into active service the whole, or such portion of the Alabama state troops as he may deem proper, for the purpose of perfecting them in military discipline and drill; the period of such service being fixed by the governor. When so ordered into service, the state shall furnish rations for officers and men, and pay such expenses of such encampment as the governor may deem proper, including the traveling expenses of officers and men incurred in obeying such orders.

Ib. sec. 21.

179. Government of encampments.—Whenever any portion of the said troops are ordered into active service, either for the purpose of perfecting them in military discipline and drill, or to aid in the enforcement of the laws of this state, officers and men so ordered into service shall, during such time,

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ever any such attached company claims said allowance for any quarter, the commanding officer thereof shall make a statement, under oath, that said company, during the time for which said allowance is claimed, had the number of parades and drills required in general orders, with the number of men pre-cribed, not less than twenty-five; and during such period was an active and efficient military organization. Such affidavit may be taken before any officer authorized to administer oaths; and any officer willfully making any false oath, for the purpose of obtaining such allowance, shall be guilty of perjury, and, on conviction thereof, shall be imprisoned in the penitentiary for not less than two nor more than five years. Such claims for such allowance, when duly verified, shall be forwarded to the commanding officer of the regiment or battalion to which such organization is attached, who shall forward it to the adjutant-general, with such recommendation as may be deemed pertinent; and the adjutant-general shall likewise forward the same to the governor, with such recommendations as he deems proper. The governor, if satisfied that such claim is just, shall approve the same, and direct the auditor to draw his warrant, in favor of the commanding officer of such company, for the amount of such claim, to be paid by the treasurer out of any money not otherwise appropriated."

be governed by the articles of war and the rules and regulations of the United States army then in force, so far as consistent with the constitution of this state.

180. Enforcing attendance.—Whenever any part of the Alabama state troops are called into the active service of the state for any purpose whatsoever, the commanding officer shall have power to enforce the attendance of officers and men; and any officer or man failing to report when ordered, without sufficient excuse, to be judged by the court-martial, shall be deemed and treated a deserter. Ib. sec. 22.

181. Election of field officers.—Upon the expiration of the term of office of any field officer, the governor shall order the field and company officers to convene at such time and place as will be most convenient, and elect field officers; or he may provide rules and regulations under which the field and company officers may forward, in writing, their ballots to the adjutant-general, who shall open the same and declare the result; and in the event there is a tie vote for any office, the governor shall appoint one of the two.

182. Discharge and enlistment.—No non-commissioned officer or private of the Alabama state troops shall be discharged from the service of the state, except by order of the governor, or upon application therefor, approved by his company and regimental commander; and every non-commissioned officer or private, hereafter enlisting in the service of the state, must have administered to him by the officer enlisting him, the following oath: "I do solemnly swear that I will support the constitution of the State of Alabama, and obey all lawful orders of my superior officers while I remain in the service of the state." The term of enlistment shall be for three years.

183. Mustering in of troops.—It shall be the duty of the governor, within sixty days after this Code goes into effect, to require every company of state troops to be mustered by some officer of the governor's staff, or a field officer, and all members of said company, who have not taken the oath of enlistment, shall be required to take said oath; and a muster-roll of said company, showing that the oath above required has been taken by each member thereof, shall be returned by the mustering officer to the adjutant-general.

184. Regimental organizations.—The three regiments of state troops, as now organized, may each be increased by the formation of new companies until there are twelve infantry companies, one artillery company, and one cavalry company attached to each regiment. The governor shall have the power to transfer any company from one regiment to another, in his discretion. No company shall be organized without its being immediately assigned to some regiment.

185. Military offenses.—The following offenses committed by any officer, non-commissioned officer, or private of the Alabama state troops are offenses against the military law within the meaning of this article, to-wit: Desertion, cowardice, insubordination, drunkenness while on duty or in uniform, resistance to, or disrespect of any guard, or patrol, or sentinel, disrespect of, or resistance to a superior officer in the execution of any lawful power of his office, violation or neglect of any lawful order, or of any camp or police regulation, or of any duty

enjoined upon any officer, non-commissioned officer, or private by this act, or any misappropriation of any funds or property of the state, or of any regiment or company of state troops, or any offense involving moral turpitude, and any conduct unbecoming an officer or a gentleman, are military offenses, to be tried by courts-martial, as hereinafter prescribed.

186. Courts-martial.—For the administration of military justice, there may be general courts-martial and regimental courts-martial. General courts-martial shall consist of not less than three nor more than five officers, exclusive of the judge-advocate, which courts shall be appointed by the governor. Such courts shall have jurisdiction of all military offenses committed by officers of the Alabama state troops, and may cashier or dismiss them from the service, and may also impose a fine not exceeding five hundred dollars, and, in default of the payment of the fine, may sentence the offender to imprisonment in the county jail for a term not exceeding six months. Regimental courts-martial shall be appointed by the colonel of a regiment, when necessary, and shall have jurisdiction of all military offenses committed by non-commissioned officers and privates of such regiment. They shall have power to sentence to dishonorable discharge from the service of the state, and also to punish by fine of not exceeding one hundred dollars, and imprisonment for not more than sixty days in the county jail, either or both. Regimental courts-martial shall consist of not less than three nor more than five commissioned officers. The colonel ordering the court shall appoint a judge-advocate. No finding of any court-martial shall be executed until approved by the governor, and whenever the finding of a court-martial is so approved by the governor, he shall cause the proper orders to be issued to carry it into effect; and when any fine is imposed and not paid, or where any person is sentenced to imprisonment in the county jail, he shall order the commanding officer of such person to cause his arrest and delivery to the jailer of the nearest jail, to be therein confined for the term of the sentence.

Nowlin v. McCalley, 31 Ala. 678.

187. Company courts-martial.—Every company, in such manner as its by-laws may prescribe, may provide for company courts-martial for minor offenses against its by-laws; and such courts-martial may dismiss any non-commissioned officer or private from the service, and may also impose fines not exceeding twenty-five dollars, subject to the approval of the company and regimental commanders.

188. Disbanding companies.—Whenever the commanding officer of any regiment reports that any company is inefficient and ought to be disbanded for the good of the service, or upon a petition of a majority of the company, the governor, inh is discretion, may order such company to be disbanded.

189. Payment of expenses.—The governor shall prescribe rules and regulations for the presentation, verifying and payment of all expenses authorized by this article; and upon his direction in writing to the auditor, he shall draw his warrant in favor of such officer, or person, as the governor may designate, for the amount so found due him by the governor.

190. Monthly drills, etc.—The commanding officer of any company may, and on the direction of the regimental commander must, and by him shall order at least one drill a month; and officers and members failing, without good excuse, to attend such drill, shall be subject to a fine, in the discretion of a court-martial, not exceeding twenty dollars. The commanding officer of a regiment may, when two or more companies are stationed at the same place, order a battalion drill or dress parade once in each month, and on memorial day, and on the occasion of the funeral of any officer or member of the state troops; and any officer or member of the state troops failing, without good excuse, to obey such order, shall be fined, in the discretion of a court-martial, not exceeding thirty dollars. Any officer failing, without good excuse, to attend any such drill or parade, so ordered, may, with the approval of the governor, be dishonorably dismissed.

191. Disobedience of orders.—Any officer, non-commissioned officer, or private, attending any drill or parade, whether under arms or not, or assembled, or assembling for the purpose of any military duty, who violates any lawful order of his superior officer (except in camp or active service, where other penalty is provided), may be placed in arrest, confined under guard, and, if the commanding officer thinks best, may be punished, by court-martial, for disobedience of orders, and punished as hereinbefore in section —.*

192. Compelling attendance before courts-martial.—Whenever any court-martial is ordered for the trial of any officer or private, it shall be the duty of the immediate commanding officer of such non-commissioned officer or private, to cause him to be brought before such court-martial, and such officer shall issue the necessary orders therefor.

193. Attendance of witnesses before courts-martial.—General and regimental courts-martial shall have power to subpœna any witness residing within one hundred miles of the place where the court is sitting, to appear and testify before it; and it shall be the duty of any sheriff receiving any subpœna issued by direction of a court-martial, and signed by the judge-advocate thereof, to make service and return of service as provided by law in civil cases; and any person failing to appear and testify according to such subpœna, without lawful excuse, is guilty of a misdemeanor.

194. Pay of traveling expenses, etc.—Officers serving on courts-martial, and officers traveling in obedience to the orders of the governor, shall be paid all actual expenses incurred by them in the performance of such duty; and witnesses before courts-martial shall be paid the same fees as are allowed to witnesses in civil cases.

195. Badge of honor.—Any officer, non-commissioned officer, or private, who shall have faithfully served in the state troops, in any grade, for six consecutive years, shall have conferred upon him the right to wear a veteran's badge, which shall be prescribed by the governor.

196. Militia officers not to exercise command over state troops.—No officer of the militia shall exercise any authority

* Omission in original manuscript.

over any portion of the Alabama state troops, except when specially ordered by the governor in writing, in case of emergency, of which the governor shall judge.

197. Forfeiture of quarterly allowance, etc.—Any company ordered into camp for the purpose of perfecting it in military discipline and drill, and failing to attend such camp with not less than twenty-five rank and file, shall, unless excused by the commanding officer of the regiment, forfeit all right to any quarterly allowance for the remainder of the year, including such as may be then due and unpaid; and any such company failing, without good excuse, to be judged of by the regimental commander, to attend two consecutive encampments, shall be disbanded.

198. Movement of troops.—No company, or part thereof, shall go out of the county in which it is stationed as a military organization, except by permission of the regimental commander or the governor; nor shall any company or regiment go out of the state except by permission of the governor.

TITLE IV.

PUBLIC PRINTING; DISTRIBUTION OF THE LAWS AND JOURNALS OF THIS STATE, LAWS OF THE UNITED STATES, AND OTHER PUBLIC DOCUMENTS.

CHAPTER 1.—Public printing.
2.—Distribution of the laws and journals of this state, laws of the United States, and other public documents.

CHAPTER 1.

PUBLIC PRINTING; BINDING.

199 (111). **Contract for, to be let out to lowest bidder.** It is the duty of the secretary of state, biennially, from and after the month of December, 1888, to let for a term of two years, commencing on the first day of January thereafter, the contract for the doing of all public printing and binding authorized by law to be done during the term. Before letting such contract, or advertising for proposals for the letting thereof, he must fix a maximum price or rate for the work, as required by section 85, of which notice must be given, and shall advertise for bids below such price or rate.

200. Contractor is public printer.—The contractor for the doing of the work is to be known and styled the public printer.

201. Secretary of state to advertise for proposals.—The secretary of state must, in one or more of the newspapers published at the capital, advertise for thirty days for proposals for the doing of such printing and binding for the term prescribed.

202 (112). **Proposals to be in writing and accompanied with bond.**—All proposals for the doing of such work must be in writing, signed by the person proposing, and must be accompanied with the bond of such person as principal, with two or more sufficient sureties, in the penalty of ten thousand dollars, payable to the State of Alabama, with condition that if the proposal of the principal is accepted, he will, for the term prescribed, do the printing and binding for the state, authorized by law to be done, and in such manner as is, or may be prescribed by law, and if he fail therein, to pay all such damages as may result from the failure. The proposals with the bond must be sealed and directed to the secretary of state, with the indorsement thereon, "Proposals for public printing and binding."

203 (113). **Opening and accepting or rejecting proposals.** The secretary of state must, on some day after the fifteenth, and before the thirty-first day of December, in the presence of the auditor and treasurer, or one of them, open at the same time all sealed proposals received by him; and shall select therefrom the lowest responsible bidder, preferring a citizen of the state, who, in his judgment, will most promptly and skillfully do the work, and whose proposal is accompanied with bond and sureties, as is provided in the preceding section. But if, in the judgment of the secretary, the public interest so requires, he may reject all the proposals, and advertise for others, as provided by law.

204 (113). **Proposal accepted, contract made.**—The secretary of state, having accepted a proposal, must indorse thereon the fact and date of acceptance, of which notice must be given to the party making the proposal; and thereupon the secretary, in the name of the state, and such party must enter into a contract in writing for the doing of the public printing and binding in the manner, and for the time prescribed by law, on the terms expressed in the proposal. If such party fails for ten days to enter into such contract, the secretary may select the next lowest responsible bidder and award the contract to him.

205 (113). **Contract approved by governor, auditor and treasurer.**—All contracts for the public printing and binding must be approved in writing by the governor and the state auditor and state treasurer.

206 (114). **Approval or rejection of bond.**—The bond of the public printer must be approved by the secretary of state; and if it be insufficient in form, or terms, or sureties, the secretary must reject it; and if after approval, from any cause, it is ascertained by the secretary not to be a sufficient security to the state, he must require the execution of a new, or of an additional bond.

207 (115). **Public printer entitled to all printing and binding.**—The public printer is entitled to, and, on demand, must receive, all the printing and binding, *including the supreme court reports, authorized by law to be done for the state during the time prescribed for the continuance of his contract.

208 (120). **Compensation of public printer.**—As work is done and furnished to the state, the public printer is entitled to

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* "Including the supreme court reports," inserted by joint committee.

GOVERNOR'S OFFICE
DO NOT REMOVE

the compensation therefor expressed in the contract, the amount whereof must be ascertained by the secretary of state, and certified to the auditor, who, on such certificate, must draw his warrant on the treasurer for the payment of the amount certified.

209 (117). **Failure to enter into or to perform contract.** If a party whose proposal is accepted fails, after notice, to enter into contract, as is prescribed in section 204, he and the sureties on his bond are jointly and severally liable for all damages resulting to the state from such failure, which damages include the difference in cost to the state for the doing of the work between the proposal of such party and the proposal subsequently accepted by the secretary of state. And if the public printer, having entered into the contract, fails or neglects to execute it promptly and skillfully in the manner therein expressed, he and the sureties on his bond are jointly and severally liable to the state for all damages resulting from such failure or neglect; and if by reason of such failure or neglect the secretary of state shall declare the contract forfeited and relet the same, such damages must include the difference in cost to the state for the doing of the work between the proposal and contract, and the proposal and contract subsequently accepted by the secretary, and the costs or expenses attending such subsequent proposal and contract.

210 (116). **Forfeiture of contract.**—If the public printer fails or neglects to perform the contract promptly and skillfully, the secretary of state, with the approval in writing of the governor, must declare the contract forfeited, and must proceed to relet the contract to the lowest responsible bidder, after advertisement, and in the manner in which the original contract was let.

211 (119). **Publication of laws in newspaper.**—The secretary of state is required to furnish to the public printer, for publication in a daily and weekly newspaper, all the laws of a general and public character, and which have effect in every county, and upon all the people of the state, passed by the general assembly at each session, within five days after their approval by the governor, or if disapproved by the governor, within five days after the passage thereof by the general assembly, notwithstanding his disapproval. Only one insertion of such laws must be charged for, and the rate of charge therefor must not exceed that expressed for printing in the contract of the public printer.

212 (122). **Copy of act signed and marked official, and when published shall be evidence.**—The secretary of state shall mark on the copy of each act furnished the public printer the word "official," and his own name and official character; and such acts, when so published, shall be recognized in courts, and elsewhere used as an exemplification of the laws on file in the office of the secretary of state.

213 (121). **Printer to furnish free of charge one copy of paper to certain officers.**—The public printer shall furnish one copy of such paper, containing the laws, to every supreme, circuit and probate judge, chancellor, solicitor, superintendent of education, register in chancery, sheriff, clerk of court,

tax-collector and tax-assessor in the state, and each member of the general assembly, free of charge.

214 (118). **Preparation of laws, joint resolutions and journal for printing.**—The secretary of state must, during and after each session of the general assembly, prepare for publication fair copies of the acts and joint resolutions of the general assembly and the journals of each house; and the numbers of the bills passed by the two houses of the general assembly, as the same are placed thereon by the secretary and clerk thereof, shall be retained thereon whenever the same are printed, and when published in the volumes of session acts.

215 (123). **Acts and resolutions; how classed and printed.** The acts and joint resolutions must be arranged in two divisions; the first containing those of a public or general character, the second those which are private or local; there must also be a title page, marginal notes to each section, stating its substance, and a full index for each division.

216 (124). **Journals; how prepared.**—The journals must be prepared with a title page and index, and must be substantially half-bound and lettered.

217 (125). **When delivered to state printer.**—The copies of the acts and joint resolutions, thus arranged with title page, marginal notes, and index, must be delivered to the public printer by the secretary of state, with his certificate that he has compared such copies with the original acts, and joint resolutions, within ten days after they are deposited in the office of the secretary of state, and copies of the journals of each house within forty days after the adjournment of the general assembly.

218 (126). **Penalty for not delivering copies of the acts and journals to printer.**—For each day's delay of the secretary of state in furnishing the public printer the copies of the acts and joint resolutions of the general assembly, and the journals of each house at the times respectively prescribed for their delivery, he shall forfeit the sum of twenty dollars, to be deducted by the auditor from his salary first accruing after such times limited; and the auditor must not pay to the secretary of state any salary accruing next after the period when such acts and journals should by law be delivered to the public printer, without first having received and filed in his office, as a voucher, the certificate of the governor that such copies of the acts and joint resolutions, or journals, or both, have been delivered by the secretary of state to the public printer, as and in the time prescribed by law, or without having first deducted the forfeiture herein required.

219 (127). **Style of printing, and quality of paper.**—The acts, resolutions and journals must be printed on paper weighing at least forty pounds to the ream, double medium, of royal octavo pages, with type of the denomination of small pica, and the marginal notes with minion; each page must contain not less than forty-five, nor more than fifty lines; the heads or titles of the index in capitals, the other part in small pica; the whole to correspond, in print, paper and execution, with the Code of Alabama.

220(128). **Copies of revenue laws printed separately.** The revenue laws passed at each session are not only to be

printed in the acts and joint resolutions, but to be separately prepared for publication, and five hundred copies printed on the same paper, of the same size, and with the same type as the acts.

221 (129). **Style of printing for general assembly.**—The printing for the general assembly, while in session, is to be executed as follows: All bills must be printed on foolscap paper, in English type, not more than twenty-four lines to a page, with one inch margin; rule or table work, in royal octavo, when it can be brought into that size in any type not smaller than brevier, and when it cannot, then so as to fold conveniently into the volume or pamphlet; all other printing on small pica type, in pages of the same size as the acts of eighteen hundred and forty-nine.

222 (130). **Blanks for the executive and state departments.**—The blanks for the executive and state departments, except parchments, are to be printed on good paper, of such size, and on such type as the proper officers may direct.

223 (131). **Parchments to be provided by the state, etc.** For all printing on parchment for the executive or state offices, the parchments are to be furnished by the state, and the printing done on such type as the proper officer directs.

As amended, Feb. 17, 1885, p. 136.

224 (132). **Laws and journals, when to be completed by the printer, and binding.**—The state printer must, within forty days after being furnished with copies of the acts and joint resolutions, print on paper, type, etc., as is herein provided, and deliver, within forty days after receiving the last act, to the secretary of state three thousand copies of such acts and joint resolutions, marginal notes and index, stitched, half-bound and lettered; and, within thirty-five days thereafter, must deliver to such officer eight hundred copies of the journals of each house, and index, stitched, half-bound and lettered.

225 (133). **Ten additional copies of bills, etc., to be printed and delivered to secretary of state.**—When any bill, joint resolution, or memorial of a general nature is ordered to be printed by either house of the general assembly, the public printer must print ten additional copies of each, and deliver them to the secretary of state.

226 (134). **Printing for general assembly, and for executive and state departments.**—He must do all the printing that may be ordered for either branch of the general assembly, when in session, and for the executive and state departments during his term.

227 (135). **Pay for printing; how made.**—For all printing done by the order of either house of the general assembly, or for the executive or state officers, the public printer must procure a certified copy of such order from the secretary of the senate, clerk of the house, or from the officer ordering the work, upon the presentation of which to the auditor, and the production of a copy of the work ordered, he must issue his warrant for the payment of the same, according to the prices specified in the contract.

228 (136). **Payment for printing laws and journals.** Upon the delivery of the requisite number of the laws and journals, within the time prescribed, and executed in all re-

spects as herein provided for, the secretary of state must give his receipt for the same, upon which the auditor must issue his warrant for payment.

229 (137). **Payment for printing revenue laws.**—Upon the delivery of the requisite number of the revenue laws, printed as herein provided for, to the auditor, he must issue his warrant for the payment.

230 (138). **Printing; where done.**—The public printing must be done at the seat of government.

231 (139). **Matter ordered to be printed by both houses.** When any matter is ordered to be printed by both houses, charge must be made for the same in all respects as though ordered by one house only, except in cases where ten days intervene between the times of the respective orders.

CHAPTER 2.

DISTRIBUTION OF THE LAWS AND JOURNALS OF THE STATE, LAWS OF THE UNITED STATES, AND OTHER PUBLIC DOCUMENTS.

ARTICLE 1.—Laws and journals of this state, etc.
2.—Laws of the United States, and other public documents.

ARTICLE I.

LAWS AND JOURNALS OF THIS STATE, AND REPORTS OF TRUSTEES AND COMMITTEES MADE TO THE GENERAL ASSEMBLY.

232 (140). **Secretary of state distributes acts and resolutions.**—The secretary of state must retain for the use of the executive offices, and the two houses of the general assembly, one hundred and fifty copies of the acts and resolutions of each session, and transmit to the department of state of the United States four copies; to the executive of each state and territory two copies, with the request to forward to the executive of this state the same number of copies of the laws of such state or territory; and distribute to the auditor, state treasurer, judges of the supreme, circuit and city courts, chancellors, attorney-general, solicitors, clerk of the supreme court, adjutant-general and quartermaster-general, secretary of the senate and clerk of the house one copy each, and the president of the University of Alabama, for the use of the law department, five copies.

233 (141). **Distribution to A. and M. College, and Institute for Deaf and Dumb and the Blind.**—It shall be the duty of the secretary of state to furnish the Agricultural and Mechanical College, and the Deaf, Dumb and the Blind Institute, at Talladega, with a copy each of such reports of the several departments of the state, and of the trustees of the State University, and committees visiting the university and asylum, as may be made to the different sessions of the legislature, and also a copy each of the journals of the senate and house of representatives, for permanent preservation in their libraries.

234 (142). **Copies sent judges of probate, for certain officers.**—He must also transmit to the judge of probate of each county, for such judge, each member of the general assembly, clerk of any court of record, sheriff, register in chancery, and each justice of the peace within his county, one copy each; and the remaining copies must be sold as other books and documents, the property of the state, at two dollars a copy, and the proceeds thereof paid into the treasury.

235 (143). **When duplicate copies furnished to judicial officers.**—Whenever any of the supreme court reports, or other books, furnished by the state to the judicial officers thereof, has been destroyed by fire without fault on their part, or on the part of their predecessors in office, the secretary of state shall furnish to the incumbents duplicate copies, if in the possession of the state, and not required for use by the state, or otherwise appropriated; but before he shall do so, the secretary of state shall be satisfied by affidavit, or other evidence, that such books were destroyed by fire without fault on the part of such officers or their predecessors.

236 (144). **To retain fifty copies of journals, and distribute remainder.**—He must retain fifty copies of the journals of each house, for the use of the executive offices and members of the general assembly, and must distribute to the state officers designated in section 232 one copy each; the remaining copies must be transmitted to the judges of probate of the several counties, in proportion to their population, to be by them distributed among the civil officers of their counties.

ARTICLE II.

LAWS OF THE UNITED STATES, AND OTHER PUBLIC DOCUMENTS.

237 (145). **Governor obtains acts of congress for judges of probate.**—The governor must obtain a sufficient number of the copies of the acts of each session of congress, to furnish one copy to the office of each judge of probate, for the use of the citizens of his county.

238 (146). **Distribution of books and papers in relation to public lands.**—Books and documents in relation to the public lands, after retaining one copy for the use of the executive and state departments, and one for the supreme court library, are to be distributed by the secretary of state among the judges of probate, for the use of the citizens of their respective counties.

239 (147). **The acts of congress to be sent by mail.**—The acts of congress are to be sent by mail to each of the judges of probate, and the postage paid by warrant of the auditor, on requisition of the secretary of state, out of the contingent fund.

240 (148). **Distribution of other books and documents.** The other books and documents are to be distributed with the acts and journals.

TITLE V.

OFFICES AND OFFICERS.

CHAPTER 1.—Persons ineligible to office; vacating and filling vacancies in office; residence and commissions.

2.—Oaths of office.

3.—Official bonds.

4.—Requiring certain public officers to give additional and new sureties in certain cases.

5.—The discharge of sureties on official bonds in certain cases.

6.—Proceedings to compel the delivery of books, papers, property and money, by public officers to their successors.

7.—Vacating office, death, resignation, removal and salary.

CHAPTER 1.

PERSONS INELIGIBLE TO OFFICE; VACATING AND FILLING VACANCIES IN OFFICE; RESIDENCE AND COMMISSIONS.

241 (149). **Persons ineligible to office.**—The persons who are ineligible to, and disqualified from holding office under the authority of this state, are,—

1. Those who are not male persons, of the age of twenty-one years.

2. Those who have not been inhabitants of the state, county, district, or circuit, the period required by the constitution and laws of the state.

3. Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or any other crime punishable by imprisonment in the penitentiary, and those who are idiots or insane.

4. Those who have in this state, or in any of the United States, given, accepted, or knowingly carried a challenge to fight with deadly weapons.

5. Those against whom there is a judgment unpaid, for any moneys received by them in any official capacity, due to the United States, this state, or any county thereof.

6. Soldiers, seamen, or mariners in the regular army or navy of the United States.

7. No person holding an office of profit under the United States, except postmasters whose annual salary does not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time, under this state, except justices of the peace, constables and notaries public.

242 (150). **Vacation of judicial office by acceptance of another office.**—The judge of a court of record, or a chancellor, vacates his judicial office by the acceptance of another office, state, county, or municipal.

243 (151). **Sentence of officer to the penitentiary vacates office.**—When any person, holding any office or place under the authority of this state, is sentenced by any court of the United States, of this state, or any other state, to imprisonment in the penitentiary, or hard labor for the county, his office or place is vacated from the time of the sentence; and if the judgment is reversed, he must be restored; but if pardoned, he must not.

Ex parte Diggs, 50 Ala. 78.

244 (152). **Residence of officers.**—All officers must reside in this state, and keep their offices in such places as are, or may be designated by law.

As amended, Dec. 6, 1880, p. 45.

245 (153). **Commissioned officers.**—The judges of the several courts, the chancellors, the attorney-general, the solicitors, the secretary of state, the auditor, the state treasurer, the clerk of the supreme court, the clerks of city courts, the clerks of the circuit courts, the sheriffs, the tax-assessors, the tax-collectors, the county treasurers, the justices of the peace, the constables and notaries public, before entering upon and exercising the duties of their respective offices, must obtain a commission.

246. Commission.—The commission must issue in the name, and by the authority of the State of Alabama, must be sealed with the great seal, and signed by the governor, and countersigned by the secretary of state, unless it be the commission of the secretary, which must be signed by the governor.

247 (296). **When commission issues to officers.**—No commissioned officer of this state, required by law to give bond, shall receive his commission until he has made his bond, and had the same properly approved and filed. In all other cases, commissions may issue, on the production of the certificate of election, to the person therein named.

248 (154). **Vacancies in county offices; how filled; term of office.**—Vacancies in all county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified.

CHAPTER 2.

OATHS OF OFFICE.

249 (155). **Dueling oath.**—In addition to the oath prescribed by the fifteenth article of the constitution, every public officer must swear that he has not, directly or indirectly, given, accepted, or knowingly carried a challenge, in writing or otherwise, to any person, being a citizen of this state, to fight with deadly weapons, either in or out of this state; or aided or abetted in the same since he has been a citizen thereof; and that he will not, directly or indirectly, give, accept, or knowingly carry a challenge to any person, being a citizen of

this state, to fight with deadly weapons, either in or out of the state; or in any manner aid or abet the same during his continuance in office.

Ex parte Dorsey, 7 Port. 293.

250 (156). **Who may administer official oaths.**—In all cases in which it is not otherwise provided by law, the oaths of office may be administered by any officer authorized to administer an oath; must be written out and subscribed by the person taking the same, and be accompanied with the certificate of the officer administering such oaths, specifying the day and year on which the same were taken.

251 (157). **What oaths of office filed with secretary of state.**—Such oaths must, when taken by the governor, any judge of the supreme court, judge of the circuit court, chancellor, secretary of state, auditor, state treasurer, attorney-general, solicitor, or any other officer whose general duties are not limited to any one county, unless it is otherwise provided, be filed, with the certificate required by the preceding section, in the office of the secretary of state.

252 (158). **Oath of judge of probate; where filed.**—Judges of probate must file their official oaths in the office of the clerk of the circuit court of their respective counties.

253 (159). **Filing of oaths of other officers.**—Judges of other inferior courts, clerks of the circuit and inferior courts, sheriffs, tax-collectors, county commissioners, justices of the peace, constables, and all other officers whose general duties are confined to a single county, must, unless it is otherwise provided, file such oaths and certificate in the office of the judge of probate of their respective counties.

254 (160). **Oaths to be indorsed with the date of filing.** The officer in whose office such oaths are required to be filed, must indorse thereon the day and year on which the same were filed, which indorsement must be signed by him.

255 (161). **Oaths of deputies; how taken and filed.**—Whenever any officer is authorized or required to appoint a deputy, such deputy, before he proceeds to act, must take the oath prescribed by the fifteenth article of the constitution, which must be accompanied with the same certificate, filed in the same office, with the same indorsement thereon, as the oaths of his principal; but the provisions of this section do not apply to any deputy who may be employed in particular cases only.

256 (162). **Oath of municipal officers.**—The mayor and aldermen of the various cities or towns in this state shall take the oath of office prescribed in article fifteen of the constitution of the state; and none other; and, upon taking the same, are absolved from any other charter oath previously taken by them.

CHAPTER 3.

OFFICIAL BONDS.

257 (163). **Official bonds, to whom payable, condition, sureties.**—The bond of each public officer, required by law to give bond, must, unless it is otherwise provided, be made payable to the State of Alabama, with such sureties as the approving officer is satisfied have the qualifications required by law, and with condition, in all cases in which a different condition is not prescribed, faithfully to discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof.

Ex parte Buckley, 53 Ala. 42; Morrow v. Wood, 56, Ala. 1; McKee v. Griffin, 66 Ala. 211; Dudley v. Chilton County, Ib. 593; Brewer v. King, 63 Ala. 511.

258 (169). **Indorsed with date of approval.**—The approval of all official bonds should be in writing indorsed on the bond, should show the day and year on which the same were approved, and be signed by the approving officer.

259 (170). **Improperly approving bond; penalty.**—The bond of any public officer, which is not in the penalty, payable, and conditioned, and has not sureties having the qualifications required by law, should not be approved; and the officer, approving a bond not conforming to the law in any or all of these respects, is guilty of a neglect of duty, and subjects himself and his sureties to an action by any person injured, and a recovery to the extent of such injury.

260 (176). **Bonds not filed unless properly approved.**—No officer, with whom any official bond is required to be filed, must allow the same to be filed in his office, unless the approval of the proper officer appears thereon, indorsed according to the provisions of section 258 (169).

261 (178). **Date of filing bond to be indorsed.**—Every officer, in whose office the official bond of any public officer is filed, must indorse on such bond the day and year when the same was filed, and sign his name to such indorsement.

262 (164, 166). **Qualifications and sufficiency of sureties.** All sureties on official bonds must be residents of the state, and the aggregate value of their property, real and personal, not exempt from debts and other liabilities, and in excess of their debts and liabilities, must equal the penalty of the bond; and such property must be within the state. If the duties of the office of the principal are limited to a single county, the sureties must be residents of that county, and their property must be therein situate.

Ex parte Buckley, 53 Ala. 42; Ex parte Plowman, Ib. 440.

263 (165). **Officers not sufficient sureties.**—No officer of the United States required to give an official bond other than postmasters; no municipal officer required to give an official bond; no officer, state or county, required to give an official bond, other than justices of the peace, notaries public and constables, must be deemed a sufficient surety on any bond taken under this chapter.

264. Attorneys or solicitors not sufficient sureties.—A practicing attorney at law, or solicitor in chancery must not be deemed a sufficient surety on the official bond of the judge of probate, or of the clerk of any court of record, or of the register of the court of chancery, or of any other officer of a court of record, or of the sheriff or deputy sheriff, or of the coroner, or of a justice of the peace, or of a notary public exercising the powers of a justice of the peace, or of any constable, general or special. Dec. 4, 1878, p. 163.

265 (167). **Bond a lien.**—The bond of the judge of the probate court, of the county clerk, of the sheriff, of the clerk of the city or circuit court, of the tax-assessor, of the tax-collector, and of the county treasurer, is a lien upon the property of the principal from the date of its execution.

County v. Timberlake, 54 Ala. 403; Knighton v. Curry, 62 Ala. 404; Watts v. Eufaula, 76 Ala. 474.

266 (168). **By whom approved.**—The bond of the sheriff, of the clerk of the city or circuit court, of the tax-assessor, of the tax-collector, and of the county treasurer must be approved by the judge of probate of the county. The bond of the judge of probate, and of the judge of the county court must be approved by the judge of the circuit court, or by the chancellor of the division in which such judge of probate, or of the county court resides.

Ex parte Candee, 48 Ala. 386; Ex parte Harris, 52 Ala. 87; Ex parte Thompson, Ib. 98.

267 (171). **Time of filing bonds with secretary of state and auditor.**—The official bonds of public officers, required by law to be filed in the office of auditor or secretary of state, must be filed therein within forty days after the declaration of election, or the appointment of such officer. As amended, Feb. 10, 1881, p. 122, sec. 3.

268 (172). **Time of filing in circuit clerk's office.**—Such bonds, when required to be filed in the office of the clerk of the circuit court, must be filed therein within twenty days after the declaration of election, or the appointment to office. Ib.

269 (173). **Time of filing in office of judge of probate.** Such bonds, when required to be filed in the office of any judge of probate, must be filed therein within fifteen days after the declaration of election, or the appointment to the office. Ib.

State v. Tucker, 54 Ala. 205.

270 (174). **In other cases, within thirty days.**—In all other cases, such bonds must be filed in the proper office within thirty days after the declaration of election, or the appointment to the office. Ib.

271 (175). **Failure to file bond vacates office.**—If any officer required by law to give bond fails to file the same within the time fixed by law, he vacates his office; and in such case, it is the duty of the officer in whose office such bond is required to be filed, at once to certify such failure to the appointing power, and the vacancy must be filled as in other cases.

Sprowl v. Lawrence, 33 Ala. 674; State v. Ely, 43 Ala. 568; State v. Falconer, 44 Ala. 696; Ex parte Candee, 48 Ala. 386; Ex parte Harris, 52 Ala. 87; Beebe v. Robinson, Ib. 66; State v. Tucker, 54 Ala. 205.

272 (177). **Notice of failure to file bond must be given to the solicitor.**—If any public officer required by law to give bond fails to file the same within the time prescribed, in the proper office, notice of such failure must be given by the officer in whose office such bond is required to be filed, by or during the first two days of the session of the circuit court held in the county in which the officer so failing resides, next after such failure, to the solicitor of the circuit to which such county belongs, or to the solicitor of the county, if there be a county solicitor.

273 (179). **Legal effect of official bond.**—Every official bond is obligatory on the principal and sureties thereon,—

1. For any breach of the condition during the time the officer continues in office, or discharges any of the duties thereof.

2. For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein.

3. For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law.

McElhaney v. Gilleland, 30 Ala. 183; Kelly v. Moore, 51 Ala. 364; Irion v. Lewis, 56 Ala. 190; Morrow v Wood, Ib. 1; Brewer v. King, 63 Ala. 511; McKee v. Griffin, 66 Ala. 211; Dudley v. Chilton County, Ib. 593; Mason v. Crabtree, 71 Ala. 479; Clark v. Lamb, 76 Ala. 406.

274 (180). **Not discharged by single recovery.**—Such bonds are not discharged by a single recovery, but proceedings may, from time to time, be instituted thereon until the whole penalty is exhausted.

275 (181). **Bond not properly executed or approved; effect of.**—Whenever any officer, required by law to give an official bond, acts under a bond which is not in the penalty, payable and conditioned, or without sureties of the requisite qualification and sufficiency, as prescribed by law, such bond is valid and binding on the obligors therein, and stands in the place of the official bond, subject on its condition being broken to all the remedies which the person aggrieved might have maintained on the official bond of such officer, executed, approved and filed according to law.

Sprowl v. Lawrence, 33 Ala. 674; Lewis v. Lee County, 66 Ala. 480.

Feb. 23, 1883, p. 181.

276. Conditional execution or delivery by sureties.—A surety on an official bond, or on a bond intended as an official bond, cannot avoid liability thereon, on the ground that he signed or delivered it on condition that it should not be delivered to the proper officer, or should not become perfect, unless it was executed by some other person who does not execute it.

277 (182). **Applies to offices hereafter established.**—All the provisions of this and the preceding chapter apply to the oaths of office and official bonds of all public officers of this state, whose office may be established hereafter, unless the contrary is expressly provided.

CHAPTER 4.

REQUIRING CERTAIN PUBLIC OFFICERS TO GIVE ADDITIONAL AND NEW SURETIES IN CERTAIN CASES.

278 (183). **Auditor and treasurer.**—It is the duty of the governor to require additional bonds of the auditor and treasurer, whenever, in his opinion, the interest of the state demands.

279 (184). **Additional bonds from officers whose bonds are approved by circuit judge or chancellor; when required.** Any judge of probate, or any other officer whose official bond is required to be approved by a judge of the circuit court or chancellor, must, upon the address of a majority of the grand jury of the county in which the duties of such office are exercised, made in term time to the presiding judge of the circuit court, or in vacation upon the address of any three members of the court of county commissioners to the judge of the circuit, be required by such presiding judge, or in vacation, by the judge of the circuit, to give an additional bond.

280 (185). **Bonds approved by judge of probate.**—Any sheriff, coroner, clerk of the circuit court, justice of the peace, constable, tax-assessor, tax-collector, or any other officer whose official bond is required to be approved by any judge of probate, must, in like manner, upon the address of the grand jury of the county, made in term time, or of three members of the court of county commissioners made in vacation, be required by such judge of probate to give an additional bond.

281 (186). **Requisition in writing, and copy served.**—The requisition to give additional bond must in all cases be in writing, and signed by the officer making the same; must state the day and place when and where the officer cited must appear and give such bond; and a copy of such requisition must be personally served on such officer before the day specified therein.

282 (187). **Additional bond; when to be given.**—Such officer must give such additional bond within ten days after the day specified in such requisition; and failing so to do, he vacates his office, and the officer making the requisition must at once certify the same to the appointing power, by whom the vacancy must be filled.

283 (188). **Penalty, etc., of additional bond.**—Such additional bond must be in the same penalty, and payable, conditioned, approved and filed in the same office, as the first official bond.

Ex parte Plowman, 53 Ala. 440; County v. Timberlake, 54 Ala. 403.

284 (189). **Effect of such bonds.**—Every such additional bond is of like force and obligation on the principal and sureties thereon, from the time of its approval, and subject to the same remedies, as the first official bond.

285 (190). **First bond not discharged.**—In no case provided for under any of the preceding sections of this chapter, are any

of the official bonds previously executed discharged; but each remains of the same force and obligation as if the additional bonds had not been given; and any person aggrieved can have his remedy upon either or all of such bonds, in the same, or in separate proceedings.

286 (191). **Rights of sureties among themselves.**—The sureties in either bond, who may have been compelled to make any payment thereon for the principal obligor, have the same remedies against the sureties in the remaining bonds as co-sureties have against each other, and may recover, against such sureties, such an amount as shall be in the same proportion to the sum paid by the plaintiff as the aggregate penalty of the two bonds bears to the penalty of the bond of the defendant, apportioning the same among the solvent sureties.

287 (192). **Five freeholders may petition to have bond declared insufficient.**—Upon the application of five or more resident freeholders of the county, addressed to the chancellor of the division or judge of the circuit, and verified by the oath of one or more of the applicants, alleging that the bond of the judge of probate, or the judge of the county court, or the clerk of the circuit court, or of the clerk of the city court, or of the sheriff, or of the tax-assessor, or of the tax-collector, or of the county treasurer, is for any cause insufficient, and setting forth the grounds upon which the allegation is based, such officer may be required to make a new bond, if, upon the hearing of such application by the chancellor or circuit judge, it shall appear that the bond is, for any cause, insufficient.

Ex parte Buckley, 53 Ala. 42.

288 (193). **Day appointed for hearing and deciding on sufficiency of bond.**—Upon the making of the application, the chancellor or circuit judge must appoint a day, not more than twenty days thereafter, for the hearing of the application, of which time and the place of hearing the same the officer shall have at least ten days' notice. If upon the hearing of the application it shall appear to the satisfaction of the chancellor, or judge, either from oral or written testimony, to be produced before him, that the bond, for any cause, is insufficient, he shall at once make an order requiring such officer to make and execute a new bond within fifteen days from the date of such order.

289 (194). **Application, order and minute of proceedings; where filed.**—The application and order, and minute of the proceedings shall be filed in the office of the circuit clerk of the county in which the officer discharges the duties of his office, except when the application is based upon the insufficiency of the bond of the circuit clerk, in which case they shall be filed in the office of the probate judge.

290 (195). **Upon failure to make new bond, office declared vacant.**—Upon the failure of any officer to make and execute a new bond, when required to do so, within the prescribed time, the office which he holds is hereby declared vacant; and in such event it shall be the duty of the circuit clerk in whose office the papers and proceedings are filed, to certify such vacancy forthwith to the officer having authority to fill the same, except when such vacancy is in the office of circuit clerk, in

which case it shall be the duty of the judge of probate to certify the vacancy; and such officer shall at once fill such vacancy by appointment.

291 (196). **Bond and affidavit required.**—The chancellor or circuit judge, before fixing the day for the hearing of such application, in addition to the oath verifying the application, must require one or more of the applicants to make oath that the application is not made for the purpose of vexing or harassing the defendant; he must further require the applicants to execute a bond with sufficient surety, in such amount as may be fixed by the chancellor or circuit judge, payable to the officer whose bond is alleged to be insufficient, with condition that the applicants will prosecute the application to effect, and will pay the officer all such damages as he may sustain for the wrongful or vexatious making of such application, together with the costs of the same.

CHAPTER 5.

THE DISCHARGE OF THE SURETIES ON OFFICIAL BONDS IN CERTAIN CASES.

292 (197). **Application of sureties to be discharged.**—Any person, who is surety upon the official bond of any public officer, required to be approved by the judge of the circuit court, or judge of probate, or chancellor, can discharge himself of such suretyship, whenever he is in danger of being made liable on such bond, and can have no adequate remedy against his principal, in consequence of his inability to discharge such liability, upon making an application in writing, setting forth such facts.

Mitchell v. Nelson, 49 Ala. 88.

293 (198). **To whom made.**—This application must be addressed to the officer, or to one of the officers required to approve such bond, and must be sworn to.

294 (199). **Notice to principal to give new bond.**—The officer to whom such application is addressed must require the principal named in such application to appear before him on and at a certain day and place, and give a new bond; which requisition must be in writing, signed by the officer making the same, and must be personally served on such principal before the day named therein.

Bruner v. Bryan, 50 Ala. 522.

295 (200). **Failure to give it.**—If such requisition is personally served, and the officer named therein fails to give an additional bond within ten days after the day specified in such requisition, he vacates his office; and the officer making such requisition must at once certify the same to the appointing power, who must fill the vacancy.

296 (201). **How approved and filed.**—On the execution of the additional bond provided for in this chapter, the same must be approved and filed, with the application and requisition, with the first official bond.

297 (202). **When sureties discharged.**—On the execution, approval and filing of such additional bond, such applicants are exonerated as sureties on the bond on which such application was made, from all liability for any breach of the condition therein contained, accruing subsequently to the filing of such additional bond.

298 (203). **When new bond goes into effect.**—Every such additional bond, approved and filed as in this chapter is provided for, is binding on the obligors from the time of its approval, and subjects them to the same liabilities, proceedings and remedies as are provided in relation to the first official bond of such officer.

299 (204). **Effect of exoneration of surety.**—The exoneration provided for in section 297 (202) does not affect the previous liability of any of the obligors; but in case of the discharge of any one or more obligors, under such section, the same shall operate as a discharge of all other obligors.

300 (205). **Sureties' rights among themselves.**—Whenever the sureties on either bond have made any payments thereon, on account of the principal obligor therein, they are entitled to the same remedies and recoveries against the sureties in the remaining bonds, as are provided by the provisions of section 286 (191).

CHAPTER 6.

PROCEEDINGS TO COMPEL THE DELIVERY OF BOOKS, PAPERS, PROPERTY AND MONEY BY PUBLIC OFFICERS TO SUCCESSORS.

301 (206). **Property and papers delivered to successor.** In all cases, in which it is not otherwise expressly provided, when any office is vacated, except by the death of the incumbent, all books, papers, property and money, belonging or appertaining to such office, must, on demand, be delivered over to his qualified successor.

Ex parte Scott, 47 Ala. 609; Thompson v. Holt, 52 Ala. 471; Chambers v. Stringer, 62 Ala. 596; Beebe v. Robinson, 64 Ala. 171; Ryan v. Couch, 66 Ala. 246.

302 (207). **Proceedings to compel delivery.**—If any person refuses or neglects, after demand made, to deliver over any books, papers, or property, as required in the preceding section, his successor may make complaint thereof to the judge of the circuit court, or judge of probate of the county in which the person refusing resides; and if such officer is satisfied by the oath of the complainant, and such other evidence as may be offered, that any such books, papers, or property are withheld, he must grant an order requiring the person so refusing to show cause before him, on a day and at a place named in such order, why he should not be compelled to deliver the same.

303 (208). **Officer discharged on affidavit.**—At the time so appointed, or at any other time to which the matter may be adjourned, a copy of such order having been personally served on the person so refusing, such officer must proceed to inquire

into the circumstances. If the person charged with withholding such books, papers, or property makes affidavit before such officer that he has delivered over to his successor all such books, papers and property in his custody, or appertaining to such office, all further proceedings against him must cease.

304 (209). **On refusal, imprisoned.**—If the person complained against does not make such affidavit, and it appears that any such books, papers, or property are withheld, the officer before whom the proceedings are had must, by warrant, commit the person so withholding to the jail of the county, there to remain until he delivers such books, papers and property, or is otherwise discharged by law.

305 (210). **Search warrant.**—In the case stated in the preceding section, if required by the complainant, such officer must also issue his warrant, directed to any lawful officer, commanding him in the day-time to search such places as may be designated in such warrant, for such books, papers and property as belonged and appertained to the office vacated, and to seize and bring them before the officer issuing such warrant.

306 (211). **Delivered to incumbent if obtained.**—Upon books, papers, or property being brought before such officer by virtue of such warrant, he must inquire and examine whether the same appertained to the office vacated, in which case he must cause such books, papers and property to be delivered to the complainant.

307 (212). **If in possession of any other person, proceedings to recover.**—If any person holding any office in this state dies, or his office in any way becomes vacant, and any books, papers, or property belonging or appertaining to such office come into the possession of any person, the qualified successor to such office may, in the manner before prescribed in this chapter, demand such books, papers, or property from the person having the same in his possession, and on the same being withheld, an order may be obtained; and the person charged may, in like manner, make oath of the delivery of all such books, papers and property that ever came into his possession; and in case of his failure to make such oath and to deliver up the books, papers, or property so demanded, such person must be committed to jail, and a search warrant may be issued, and the books, papers, or property siezed by virtue thereof delivered to the complainant, as hereinbefore prescribed.

CHAPTER 7.

VACATING OFFICE, DEATH, RESIGNATION, REMOVAL AND SALARY.

308 (213). **How offices are vacated.**—Any office in this state is vacated,—

1. By the death of the incumbent.
2. By his resignation, except in such cases as are excepted by law.

Williams v. Fitts, 49 Ala. 402.

3. By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

4. By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

5. By an act of the general assembly abridging his term of office, when the same is not fixed by the constitution.

6. In such other cases as are or may be declared by law.

309 (214). **Vacation of offices of clerk of the circuit court, etc.**—The offices of clerk of the circuit court, tax-collector, tax-assessor, county treasurer, and justices of the peace are respectively vacated from the expiration of the incumbent's term, when there is a failure to elect at any general election, where such officers are elected by the people.

310 (215). **Notice of death of member of congress, or of general assembly, etc.; by and to whom given.**—On the death of any senator or representative from this state to the congress of the United States, or of any member of the general assembly, the judge of probate of the county in which such officer, at the time of his death, resided, must give notice thereof to the governor; in case of the death of the governor, such judge of probate must give notice to the president of the senate; and in case of the death of any other officer, to the officer who fills the vacancy.

311 (216). **Notice of death of judge of probate given by circuit clerk.**—On the death of any judge of probate, the clerk of the circuit court of the county for which he was elected must give notice thereof to the governor.

312 (217). **The resignation of the governor.**—The governor, if he resigns during the session of the general assembly, must transmit his resignation to the president of the senate; otherwise, to the secretary of state, who must notify the president of the senate.

313 (218). **Resignation of members of congress, etc.**—The resignation of senators and representatives in congress, and members of the general assembly must be transmitted to the governor; and in all other cases, except justices and constables, to the officer or tribunal which fills the vacancy.

314 (219). **Resignation of justices and constables.**—The resignation of justices and constables must be transmitted to the judge of probate of the county in which the office may have been held.

315 (220). **Notice of removal from county, etc.**—Notice of removal of any officer, other than justices of the peace or constables, from the state, or from the district, circuit, or county, for which he was elected or appointed, must be given by and to the same officers as notice of his death is required by this chapter to be given.

316 (221). **Notice of judgment vacating office to be given by clerk.**—Whenever there is a judgment of a competent tribunal declaring any election or appointment void, or any office vacated, such judgment must, if the vacancy is filled by appointment, the day after the time for taking an appeal has expired, be certified by the clerk of such court, or by the judge, if there be no clerk, to the appointing power.

317 (222). **Notice of vacancies to be filled by the general assembly.**—The governor must give notice to the general assembly, at each session thereof, of all offices to be filled by that body, which have become vacant, or which will be vacated by the expiration of the term of office before the next regular session.

318 (223). **Salaries; when due.**—The salaries of all officers are payable on the last day of each month.

TITLE VI.

ELECTORS AND ELECTIONS.

CHAPTER 1.—Electors and their registration.
2.—General elections.
3.—The mode of notifying, and manner of conducting general elections.
4.—Contesting elections.
5.—Electors of president and vice-president.
6.—Elections in new counties, until entitled to separate representation for congress and members of the general assembly.
7.—Elections on amendments to the constitution.
8.—Penalty against officer for failure to make returns to secretary of state and speaker of the house of representatives.

CHAPTER 1.

ELECTORS AND THEIR REGISTRATION.

ARTICLE 1.—Electors.
2.—Registration of electors.

ARTICLE 1.

ELECTORS.

319 (224). **Qualification of electors.**—*Every man, a citizen of the United States, and every man of foreign birth, who has been naturalized, or who may have legally declared his intention of becoming a citizen of one of the United States, before he offers to vote, who is twenty-one years old, or upwards, who shall have resided in this state one year, three months in the county, and thirty days in the precinct or ward next immediately preceding the election at which he offers to vote, is, unless within the disabilities imposed by the provisions of this chapter, a qualified elector, and may vote in the precinct or ward of his actual residence, and not elsewhere, for all officers elected by the people; but electors, qualified as aforesaid, who have resided in any incorporated city in this

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* "Male" changed to "man" by joint committee.

state, having a population of more than twenty thousand inhabitants, for thirty days immediately preceding any election, and have within such thirty days removed their residences from one ward to another in the same city or town, shall, after a residence therein of one day, be entitled to vote in the ward in which they reside at the time of the election; but each of such electors must first deposit with the inspectors of election in said ward the certificate of the judge of probate, that said elector is duly registered in the ward from which he has removed; and the name of each of such electors shall be erased, or caused to be erased by the judge of probate from the registration list, immediately upon the issue of the certificate, and the name of the elector shall be entered upon the registration list of the ward to which he shall have removed his residence, any law of the state to the contrary notwithstanding.

320 (225). **Disqualifications of electors.**—Those who have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary, and idiots or lunatics shall not be permitted to vote in this state at any election by the people.

321 (226). **Loss or acquisition of residence.**—No person shall lose or acquire a residence either by temporary absence from his place of residence without the intention of remaining, or by being a student of any institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his place of residence in the civil service of the state, or the United States; neither shall any soldier, sailor, or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state.

ARTICLE II.

REGISTRATION OF ELECTORS.

322 (227). **Secretary of state superintends.**—The secretary of state shall superintend the registration of electors.

323 (228). ***Secretary of state appoints registrars.**—The secretary of state, on or before the first Monday of May, 1888, shall appoint one registrar in each county in this state, who shall hold his office for the term of four years from such appointment. Said registrar shall appoint one assistant registrar for each voting precinct or ward in the county for which such registrars are respectively appointed, and such assistant registrars shall hold their offices respectively until the expiration of the term of office of the registrar by whom they were appointed. And such registrars and assistants, before entering on their duties, shall take the oath of office, as prescribed in section one, article fifteen of the constitution of Alabama, which oath may be administered by any officer authorized by law to administer oaths in this state, which must be filed in the office of the judge of probate of the county. Such assistant registrars shall, if required to do so by the courts of county

* Rewritten by joint committee.

commissioners, or boards of revenue, as the case may be, make a full registration list, as is hereinafter provided, of all the electors in the precincts or wards for which such assistants are appointed respectively; and the assistant registrars are authorized to administer the registration oath; and it shall not be lawful for any other officer or person to administer the same.

324 (229). **To return list of registered electors.**—It shall be the duty of each assistant registrar to make a due and correct return of the list of registered electors made by him.

325 (230). **Place and manner of registration.**—It shall be the duty of such assistant registrars within the several precincts or wards, for which they are appointed respectively, to make registration of the electors residing in such precincts or wards upon blank forms provided for that purpose, and shall not register in any other way, or on any other form than that prescribed.

326 (231). **Oath of elector, and how subscribed.**—Before registering electors, the assistant registrars shall cause each qualified elector to take and subscribe an oath that he is a qualified elector under the constitution and laws of the State of Alabama; and the name of each elector must either be subscribed to such oath by the elector himself, or the same may be subscribed by the assistant registrar, but when signed by the assistant, it must be by the direction of the elector, which shall be evidenced by the attestation of the assistant registrar's name, written opposite to the name of the elector, under the appropriate head on the prescribed form; and the oath shall be in the printed and written form at the head of the registration list prescribed by this chapter; and the names of the electors shall be subscribed to the same under the appropriate head prescribed for the same in such list.

327 (232). **Number and date of registration, residence, employment, color of elector and name of employer.**—The assistant registrars shall write opposite to the name of each elector, under the appropriate head in such form, the number and date of registration, his place of residence, whether white or colored, his employment, and, if he is in the employment of another, the name of such employer, and, if the elector resides in any town or city, the street and number, or other mark or description by which his place of residence may be identified.

328 (233). **Registration on election day and certificate.** The assistant registrars shall be present at the voting precinct or ward for which they are respectively appointed, on the day of election, to register such electors as may have failed to register on any previous day in their precincts or wards, which registration must be done, in every respect, according to the form prescribed; and the assistant registrar shall furnish to each elector, who may register on the day of election, a certificate of registration, which shall be in the following form:

"I, ———, assistant registrar, do hereby certify that ——— has this day registered before me as an elector.

[Signed] —— ———, Registrar."

Which certificate, signed by the registrar, shall be sufficient evidence that such elector is registered; and if such assistant registrar fails to attend, or there is a vacancy in the office, the

county registrar shall appoint some competent person as assistant registrar for that day; and if no appointment is made by ten o'clock of that day, then the inspectors of election may appoint an assistant registrar, who may qualify and act as such for that day; but this section shall not apply to incorporated towns or cities having a population of more than five thousand inhabitants, except as is hereinafter provided by this chapter.

329 (234). **Duplicate copies of list to be made and bound; original books subject to inspection; additional registration; supplemental returns.**—Each assistant registrar, after having registered all the electors in his precinct or ward, as near as may be, and not more than three months after his appointment, shall make a true copy of the same in the registration book furnished for the purpose under the provisions of this chapter, and shall also make a true copy or duplicate of the original registration list, which, together with the original, as soon as practicable after the same is completed, shall be returned to the office of the judge of probate of the county in which such registration is made, and delivered to him, who shall, as soon as the registration for all the precincts and wards in such county have been made, cause the original lists so returned to him to be securely bound in book form, in good substantial pasteboard binding, and preserve the same in his office for public inspection, keeping the several precincts and wards separate from each other in arranging the same for binding, but binding the whole of the originals for the county in one volume, appropriately labeled; and the judges of probate of the several counties shall, as soon as such returns are fully made, return the duplicates to the secretary of state, who shall arrange the same by precincts, wards and counties, and so cause the same to be bound in one or more volumes, and in such style as he may deem advisable for convenient reference and preservation; and the registration books, made out by the assistant registrars in the several precincts and wards, shall be kept by them, subject to the inspection of the public, and in which they shall make entry of all additional registrations made by them respectively, and shall, not less than fifteen days before any general or special election held in the county, make a supplemental return to the judge of probate in like manner as the first return.

330 (235). **Assistant registrars to revise lists, and deliver same to judge of probate.**—It shall be the duty of such assistant registrars, in each year, to make a revised list of electors for their precincts or wards, showing the names of all such electors as shall be known to, or be proven to them to have died, or to have removed from the ward or precinct, or to have become disqualified as electors by the conviction of any felony, and also of all such as have registered at and since the last election; which list shall be prepared in the manner prescribed for the other lists, and shall be delivered to the judge of probate not less than fifteen days before any general or special election, and in incorporated towns or cities having a population of more than five thousand inhabitants, not less than ten days before a general or special election.

331 (236). **When registration prohibited; special registrations, how returned and treated.**—It shall not be lawful to register any elector within twenty days before, or in any in-

corporated town or city having a population of more than five thousand inhabitants, within fifteen days before any general or special election; and all registrations made on the election day, by any registrar appointed for that day only, shall be returned to the assistant registrar for that precinct or ward, properly certified, which shall be returned to, and be treated by the judge of probate as if made by the regular assistant registrar. But in incorporated cities or towns having a population of more than five thousand inhabitants, any person who may have attained the age of twenty-one years, within fifteen days next preceding any general or special election, and who is qualified to vote, may be registered by the judge of probate, or by the assistant registrar, on the day of election, in the same manner as is prescribed for the registration of electors. The name of such elector shall be entered upon the registration list of the ward in which such elector shall reside, and a certificate of registration shall be issued to him.

332 (237). **Compensation of registrars and assistants.** The compensation of registrars shall be two cents, and of assistant registrars shall be three cents, for each person registered, which shall be paid by the several counties in which such registration is made, as a preferred claim against the county; and such claim shall be receivable in payment of county dues.

333 (238). **Books and blanks furnished judges of probate.** The secretary of state must furnish to the judges of probate of the several counties the books and blanks necessary for the use of the several assistant registrars; such blanks shall be printed and ruled on good paper, suitable for binding in book form, one-third of which shall be securely bound in good pasteboard and leather binding, in sufficient numbers to furnish one book to each assistant registrar; and each page of such blanks and books shall be in the following form:

"State of Alabama, } We, the undersigned registered electors,
County of———. } each for himself, do solemnly swear (or affirm) that I will support and maintain the constitution and laws of the United States, and the constitution and laws of the State of Alabama; that I am not excluded from registering or voting by any of the clauses in section three, of article eight of the constitution of the State of Alabama, and that I am a qualified elector under the constitution and laws of this state.

No.	Date.	Names of electors.	White or colored.	Registrar's attestation.	Residence by precinct or ward.	Employer's name and remarks.

I, —— ———, registrar for said precinct (or ward, in ——— city), in said county, do hereby certify that the above and foregoing names of registered voters, from number one to ——, inclusive, were duly registered by me according to law, between the dates of —— and ——, in said precinct (or ward), and that each of said persons, so registered, took and subscribed before me the above and foregoing oath, on the days and dates set opposite to their several names respectively.

Witness my hand, this —— day of ——, 18—.

—— ———, Registrar."

334 (239). **Judges of probate make out and file registration lists, furnish copies to inspectors, and post list.**—Each judge of probate of the several counties shall, from the registration list of electors returned to their several offices, make a correct alphabetical list of the qualified voters of such county, arranged by precincts and wards, correcting and completing the same from the supplemental and revised returns of assistant registrars, which list, when so completed, shall be certified by the judge of probate officially to be a full and correct transcript of the list of registered electors, as the same appears from the returns of the registrars in his office; one copy of which list the judge shall deliver to the inspectors of election in each precinct or ward, immediately preceding every election, and one copy of the whole list of registered electors in the county shall be posted at the court-house of the county ten days, and, in incorporated towns and cities having a population of more than five thousand inhabitants, five days before the election.

335 (240). **Compensation of judges of probate.**—Each judge of probate of the state shall be paid by the county such reasonable compensation for certifying such alphabetical list as may be allowed by the court of county commissioners, or the board of revenue, to include the necessary expense of printing; and in making up such alphabetical list he shall be authorized to appoint such clerical force as such court, or board, shall deem necessary; and such court, or board, shall fix the compensation for such clerical work; and the compensation provided for in this section shall be a preferred claim against the county.

336 (241). **Registration must be in precinct or ward.**—It shall not be lawful to register any person, except in the voting precinct or ward in which such person is entitled to vote, and the assistant registrar, when he has no personal knowledge of the identity or residence of an elector, shall examine him under oath touching the same, which oath shall be administered by the assistant registrar.

337 (242). **Vacancies, how filled.**—The registrar for each county shall fill any vacancy which may occur in the office of assistant registrar; and the person so appointed, when qualified, shall be entitled to, and shall take possession of all the books and papers of his predecessor.

CHAPTER 2.

GENERAL ELECTIONS.

ARTICLE 1.—General elections; for what offices, and in what cases.
2.—Election precincts and boxes.

ARTICLE I.

GENERAL ELECTIONS; FOR WHAT OFFICES, AND IN WHAT CASES.

338 (243). **Officers elected by the people.**—The following officers in this state shall be elected by the qualified electors thereof: Governor, secretary of state, state treasurer, state auditor, attorney-general, superintendent of education, senators and representatives of the general assembly, chief justice and associate justices of the supreme court, judges of the circuit court, chancellors, judges of the probate court, and judges of other inferior courts in cases not otherwise provided for by law, sheriffs, coroners, and clerks of the circuit court, tax-assessors, tax-collectors, county treasurers, county commissioners of roads and revenues, constables, justices of the peace, representatives in congress, and electors for president and vice-president of the United States.

339 (244). **General elections.**—General elections throughout this state shall be held for governor, secretary of state, state auditor, state treasurer, attorney-general, superintendent of education, chief justice and associate justices of the supreme court, and electors for president and vice-president of the United States; for a member of congress in each congressional district; a chancellor in each chancery division; a judge of the circuit court in each judicial circuit; a senator for each senatorial district; a representative or representatives to the general assembly, a judge of probate, sheriff, clerk of the circuit court, tax-assessor, tax-collector, a county treasurer in every county where such office exists, coroner and county commissioners, in each county; justices of the peace and constables in each precinct of the county.

340 (245). **Time of electing state officers, executive and legislative.**—The governor, secretary of state, state treasurer, state auditor, attorney-general, superintendent of education and representatives in the general assembly shall be elected on the first Monday in August, 1888, and every second year thereafter; senators from the odd numbered districts shall be elected on the first Monday in August, 1888, and every fourth year thereafter; senators from even numbered districts shall be elected on the first Monday in August, 1890, and every fourth year thereafter.

341 (246). **Time of electing county officers.**—One sheriff, one coroner, four county commissioners of roads and revenues, one tax-assessor, one tax-collector, one county treasurer, where such office exists, two justices of the peace and one constable for each election precinct shall be elected on the first Monday in August, 1888, and every fourth year thereafter; but as to county commissioners and treasurers, this section shall not apply to counties where special laws as to those offices are in force.

342 (247). **Time of electing judicial and ministerial officers.**—The judges of the supreme court, chancellors, judges of the circuit and probate courts and judges of city and other inferior courts, except in cases otherwise provided for by law, and clerks of the circuit and city courts shall be elected on the first Monday in August, 1892, and every sixth year thereafter.

343 (248). **Time of electing presidential electors and members of congress.**—Electors for president and vice-president of the United States shall be elected on the first Tuesday after the first Monday in November, 1888, and every fourth year thereafter; a member of congress from each congressional district shall be elected on the first Tuesday after the first Monday in November, 1888, and every second year thereafter.

ARTICLE II.

ELECTION PRECINCTS AND BOXES.

344 (251). **Election precincts.**—The counties in this state, as now divided into election precincts, and the boundaries of such precincts, as now defined, shall so remain until changed by an order of the court of county commissioners, or by an act of the general assembly.

345 (252). **Establishment, change and abolition.** — The courts of county commissioners may, in their respective counties, establish, change, or abolish election precincts, and places of voting therein, and may change the boundary lines thereof, as the convenience of the voters in such precincts may, in their judgment, require; but no order under this section shall take effect, unless made at least sixty days before any election, nor until three months after notice thereof has been posted up at the court-house door of such county.

346 (253). **Two places of voting in the same precinct.** The several courts of county commissioners, within their respective counties, may establish two places of voting in the same election precinct, when it is deemed necessary to the convenience of the voters therein; but no such change shall be made within less than thirty days before an election.

347 (254). **Orders for same to be recorded.**—All orders made under the provisions of the two preceding sections must be recorded within three days after the adjournment of the court at which the same were made.

348 (255). **How numbers and boundaries of precincts and places of voting are known.**—The numbers and boundaries of precincts and the places of holding elections must be known and designated as entered upon the records of the court of county commissioners.

349 (256). **Places of voting.**—The court-house is the place of holding elections in the precinct or ward in which it is situated, and elections must be held at such places in the other precincts or wards as are now designated by law for that purpose, or may hereafter be designated by the court of county commissioners; but no change shall be made within less than sixty days before any election.

350 (257). **Notice of change in precincts and places of voting.**—Whenever a change has been made by the court of county commissioners in the number or boundaries of a precinct or ward, or in the places of voting therein, it shall be the duty of the judge of probate, within five days thereafter, to give notice of such change, to be posted by the sheriff at the court-house door, and at two public places in such precinct or ward. Such notice must describe such precinct or ward by its number, and must specify the place where elections are to be held therein, and the change or changes, if any, in the boundaries or number thereof.

351 (258). **Number of ballot-boxes and by whom provided.** The judge of probate, sheriff, and clerk of the circuit court of each county in this state shall provide one ballot-box, and where it is deemed necessary, shall provide more than one, and not more than three, at each place of voting.

CHAPTER 3.

THE MODE OF NOTIFYING, AND MANNER OF CONDUCTING GENERAL ELECTIONS.

ARTICLE 1.—The appointment of, and notice to inspectors and returning officers; notice of the election; attendance of inspectors and returning officers; appointments of clerks, and oaths.

2.—Special elections, how ordered and conducted.

3.—Opening and closing the polls, voting and challenges; order and arrests.

4.—Counting out and estimating the votes, giving the casting vote, preserving the ballots and poll lists, and making returns.

5.—Certificates of election; casting votes.

6.—Filling vacancies in the offices of justices and constables.

ARTICLE I.

THE APPOINTMENT OF, AND NOTICE TO INSPECTORS AND RETURNING OFFICERS; NOTICE OF THE ELECTION; ATTENDANCE OF INSPECTORS AND RETURNING OFFICERS; APPOINTMENT OF CLERKS, AND OATHS.

352 (259). **Inspectors and precinct returning officers, how appointed.**—The judge of probate, sheriff, clerk of the circuit court, or any two of them, must, at least thirty days before the holding of any election in their county, appoint three inspectors for each place of voting, two of whom shall be members of opposing political parties, if practicable, and one returning officer for each precinct, to act at the place of holding elections in each precinct; and it shall be the duty of the sheriff to notify such inspectors and returning officers of their appointment within ten days after such appointment.

353 (260). **Sheriff is county returning officer.**—The sheriff of each county, or the person discharging the duties of such office, is the returning officer for his county.

354 (261). **Notice of election given by sheriff.**—The sheriff must give notice, at least thirty days before each election, by publication in some newspaper in his county, if any is published therein, and if not, by writing posted at the court-house door, and three other public places in the county, of the time of holding, and the offices to be filled by such election.

355 (262). **Duties of inspectors and returning officers; how places supplied on failure to attend.**—It shall be the duty of the inspectors and the returning officers appointed to meet at the place of holding elections in the several precincts for which they have been appointed, by eight o'clock of the morning of the day of election, and, before nine o'clock, open the several polling places as designated; and on the failure of any inspector or returning officer to attend at the hour of eight o'clock, such as may be present may complete the number. If none of the inspectors appointed are present, the returning officer of the precinct shall appoint three inspectors to act, who, in every such instance, shall be qualified electors who are entitled to vote at that polling place; and if there should be no inspector or returning officer present by the hour of eight o'clock at any polling place, then any three qualified electors who are entitled by law to vote at that polling place, in the election then to be held, may open the polls and act as inspectors during the election.

356 (263). **Returning officer absent, inspectors appoint.** If the returning officer is not present at the hour appointed, the inspectors, or those acting as such, must appoint one to serve during the election.

357 (264). **Clerks of election.**—Inspectors, before opening the polls, must select two persons to act as clerks.

358 (265). **Oath of inspectors and clerks.**—Before opening the polls, the inspectors and clerks must take an oath to perform their duties at such election according to law, to the best of their judgment.

ARTICLE II.

SPECIAL ELECTIONS; HOW ORDERED AND CONDUCTED.

359 (249). **Special elections; when and for what offices held.**—Special elections are to be held in the following cases:

1. When a vacancy occurs in the office of senator or representative in the general assembly, when the general assembly will be in session prior to the next general election for that office.

2. When a vacancy occurs in the office of representative in the congress of the United States, by which the state may be deprived of its full representation at any time congress will be in session prior to the next general election for that office.

3. Whenever any general or special election for members of the general assembly, or for representatives in congress, is not held.

4. When any vacancy occurs in any state or county office filled by election of the people, not otherwise provided for by the constitution or laws of this state.

5. In such other cases as are, or may be provided for by law.

360 (250). **Day for holding special elections.**—All special elections shall be held on such day as the governor may direct.

361 (266). **Special elections ordered by governor.**—All special elections, provided for by this article, are to be ordered by the governor, who must issue writs of election, directed to the sheriffs of the counties in which such election is required to be held; and must specify therein the district or county in which, and the day on which, such election is to be held; the cause and object of the same; the name of the person in whose office the vacancy has occurred; and in all cases in which a special election is directed in a district composed of more than one county, such election must be directed to be held on the same day in each county.

362 (267). **Proclamation of election for congress or state officers.**—The governor must give notice of any special election for representatives in congress, or state officers, by proclamation.

363 (268). **Sheriff to give notice of elections in his county.** Whenever the sheriff of any county receives a writ of election, directing a special election to be held, or receives notice of a special election for representative in congress, state or county officers, by proclamation, such sheriff must immediately give notice of the time, place and object of such election, as provided for by law.

364 (269). **Sheriff must notify probate judge and clerk.** When any special election is ordered by the governor, the sheriffs of the counties in which such election is to be held, must, within three days after receiving notice thereof, notify the probate judge and clerk of the circuit court of their respective counties of such special election.

365 (270). **How conducted and certificates given.**—Special elections are to be held and conducted, the returns thereof made, and certificates given, and, unless otherwise expressly provided, regulated in all respects by the provisions in relation to general elections.

ARTICLE III.

OPENING AND CLOSING THE POLLS; VOTING AND CHALLENGES; ORDER AND ARRESTS.

366 (271). **Hours of opening and closing the polls.**—The polls must be opened at each place of voting, in each precinct, between the hours of eight and nine o'clock in the morning, and be kept open, without intermission or adjournment, until the hour of five in the afternoon, and no longer.

367 (272). **Proclamation to be made.**—The inspectors, before they commence receiving ballots, must cause it to be proclaimed aloud at the place of voting, that the election is opened.

368 (273). **Vote to be by ballot, in county and precinct.** At all elections by the people of this state, the elector must vote by ballot, and in the county and precinct or ward where his residence is situated, and nowhere else; and if any elector attempts to vote in any other precinct or ward than that wherein he resides, his vote must be rejected.

As amended, March 1, 1881, p. 28.

369 (274). **Description and contents of ballot.**—The ballot must be a plain piece of white paper, without any figures, marks, rulings, characters, or embellishments thereon, not less than two and one-half inches, nor more than three inches in width, and not less than five nor more than ten inches in length, on which must be written or printed, or partly written and partly printed, only the names of the persons for whom the elector intends to vote, and must designate the office for which each person so named is intended to be chosen.

Ib.

370. When ballot not insufficient.—No ballot shall be rejected as illegal by reason of the abbreviation of the names of the persons voted for, or by reason of the use of numerals as abbreviations, or by reason of the erasure of names and the insertion of other names, if what is meant by the ballot appears from its face; nor shall any ballot be rejected as illegal by reason of its non-conformity to the prescribed dimensions, if it reasonably appears that the elector had no intention to violate the statute.

As amended, Feb. 8, 1879, p. 78.

371 (275). **Ballot received and name called.**—When any elector votes, one of the inspectors must receive his ballot folded, and call his name audibly and distinctly, and the name of each elector whose ballot has been received must be immediately taken down by each clerk on separate lists, which shall be headed "names of voters," and called "poll lists;" and the number of the order in which such elector votes must, at the same time, be entered by each clerk against his name, the first elector voting being numbered one, the second, two, and so on; to the last elector voting.

Ib.

372 (276). **Duty of inspector as to ballot, when received.** The inspector receiving the ballot shall pass it to each of the other inspectors, and it must then, without being opened or examined, be deposited in the proper ballot-box.

373 (277). **Challenges.**—Any qualified elector of the precinct or ward in which any person proposes to vote, shall have the right to challenge such person so offering to vote, who, he may know or suspect, is not entitled and duly qualified as an elector to vote at the precinct or ward where he offers to vote.

374 (278). **Oaths administered by inspectors in case of challenge.**—When any person offering to vote is challenged by any qualified elector, before such person shall be allowed to vote, he shall take and subscribe an oath, which one of the inspectors shall tender and administer to him, and which shall be in the following form:

"State of Alabama, } I, ———, do solemnly swear (or af-
——— county. } firm) that I am a duly qualified elector under the constitution and laws of the United States, and the constitution and laws of the State of Alabama, and that I have resided in the State of Alabama one year next preceding this election, three months in this county, and have actually resided thirty days in this precinct or ward (as the case may be) next preceding this day (or in case of change of residence provided for by section 319 (224), have resided in the state one year, three months in this county, thirty days in this city, and one day in this ward), all immediately preceding this election, and that I am twenty-one years of age, or upwards, and that I have

not voted before on this day, at any general or special election, at any place of voting, and that I have not been convicted of treason, embezzlement of public funds, malfeasance in office, or of any crime punishable by law with imprisonment in the penitentiary, or larceny, or bribery; so help me God." And in addition to such oath, if the person so challenged is not personally known to one of the inspectors to have the qualifications required by law, then one of them shall require such person, before he shall be allowed to vote, to prove his identity and residence in the state, county, and precinct or ward in which he offers to vote, by the oath of some elector personally known to some one of such inspectors to be a qualified elector, which oath shall be administered by one of the inspectors, and be in the following form:

"State of Alabama, } I, ——— ———, do solemnly swear (or af-
——— county. } firm, as the case may be) that I have known (here insert the name of the person offering to vote) for the last twelve months preceding this election, and that he has been a resident of this state for said time, three months in this county, and that he has actually resided in this precinct (or ward) for the last thirty days preceding this election (or in case of the change of residence provided for by section 319 (224), that he has resided in this state for one year, three months in this county, thirty days in this city, and one day in this ward), all immediately preceding this election; and I believe that he is twenty-one years of age, or upwards, and that he has not voted before on this day, at any general or special election; so help me God." And upon such oath being duly taken and subscribed, the ballot of the person offering to vote must be received and deposited, as other ballots of qualified electors. And it shall be the duty of the inspectors to file all the oaths so taken and subscribed; and when the election is closed, such inspectors shall forward them, in a sealed package, to the judge of probate, who shall lay them before the next grand jury sitting for such county.

375 (279). **Inspector must inform person challenged of penalty for false swearing.**—When any one offering to vote at any election in this state has been challenged, before administering the oath prescribed, it shall be the duty of one of the inspectors to inform such person that if he takes the oath willfully and falsely, he is guilty of perjury, and, on conviction, may be imprisoned in the penitentiary for not less than two years.

376 (280). **Rejected ballot marked and laid aside.**—If the person challenged refuses to take the oath, or if he fails to prove his identity and residence, when and in the manner required, his vote shall be rejected, and the ballot, marked with his name, shall be laid aside by the inspectors.

377 (281). **Duty of sheriff and deputies on election day.** It shall be the duty of the sheriff of each county in this state, on each day of election, to be present, in person or by deputy, at all election precincts where elections are held in his county, whose duty it shall be to preserve good order; and no person shall be allowed within thirty feet of the ballot-box, except while casting his vote; but qualified electors, members of, and representing the different political parties, and not to exceed in

number five for each party, shall be allowed, without restriction as to distance, as hereinbefore prescribed, to attend each voting place for the purpose of challenging persons who may be suspected of attempting to vote illegally. In order that every elector, who desires to vote, shall do so without interference or interruption, and to maintain good order, and to carry out the intent and purposes of this act, such sheriff, or his deputy, may specially deputize a sufficient force to act at all election precincts, on the day of any election, that he, in his judgment, may deem necessary to maintain good order; and, in case of necessity, raise a posse comitatus to put down all riots, or attempted riots, or disturbances.

378 (282). **Arrest of elector on day of election.**—An elector must not be arrested on the day of election, unless it be for a felony, or for a breach of the peace attempted or committed on that day, or for a violation on that day of a provision of the election law. For such breach of the peace, or attempted breach of the peace, or violation of the provisions of the election law, the sheriff or his deputy may arrest without process, and commit to jail until the offender shall give bond with good and sufficient surety, to be approved by the sheriff, for his appearance at the next term of the circuit or city court to answer any indictment which may be found against him.

379 (283). **Arrest of persons intoxicated.**—Any person, found drunk or intoxicated at or about any polling place during any election day, shall be arrested by the sheriff or his deputy, and dealt with as prescribed in the preceding section.

380 (284). **Unlawful to sell or give away liquor.**—It shall be unlawful for any person or persons to sell or give away any liquors, of whatever kind or description, during the day on which any election may be held, or on the day preceding; and it shall be the duty of the sheriff, deputy sheriff, or any constable to arrest all persons violating the provisions of this section, and deal with them as above prescribed.

ARTICLE IV.

COUNTING AND ESTIMATING THE VOTE, PRESERVING BALLOTS AND POLL LISTS, AND MAKING RETURNS.

381 (285). **Counting votes.**—It is the duty of all inspectors of elections in the election precincts, immediately on the closing of the polls, to count the votes so polled.

As amended, Feb. 13, 1879, p. 73.

382 (286). **Manner of counting votes.**—In counting, the returning officer, or one of the inspectors, must take the ballots, one by one, from the box in which they have been deposited, at the same time reading aloud the names of the persons written or printed thereon, and the office for which such persons are voted for; they must separately keep a calculation of the number of votes each person receives, and for what office he receives them; and if two or more ballots are found rolled up or folded together, so as to induce the belief that the same was done with a fraudulent intent, they must be rejected; or if any ballot contains the names of more persons than the voter had a right to vote for, the first of such names on such ballot, to the number the voter was entitled to vote for, only must be counted.

383 (287). **Statement of votes and one poll list certified, sealed up and delivered to returning officer.**—As soon as the ballots are all counted, the inspectors must ascertain the number of votes received for each person and for what office, and must make a statement of the same in writing, which statement must be signed by them; they must also certify in writing, on one of the poll lists, that such poll list is the poll list of the election precinct or ward, at which they were inspectors, the day and year on which such election was held, and for what offices, which certificates must be signed by them; and such statement of the poll lists and votes, thus certified, must be sealed up, together with a list of the registered voters in such precinct or ward at such election, on such day, in a box to be furnished by the sheriff of the county, one or more for each precinct or ward, and to consist of wood, tin, or sheet-iron, and securely fastened by locks, directed to the sheriff of the county, if there be one, and if none, then to the person discharging the duties of such office, and immediately deliver the same to the returning officer of the precinct.

384 (288). **Ballots and second poll lists, how disposed of.** The inspectors must count the ballots deposited in the box; as soon as all the ballots contained in the box are counted, the inspectors shall roll up the ballots so counted, and label the same, so as to show for what officer or officers the ballots contained therein were received, and, when so rolled up and labeled, shall be securely sealed; the rejected ballots, if any, shall also be rolled up and labeled as rejected ballots, and sealed up as the other parcels; and the packages so sealed up and labeled, together with one poll list, which shall also be securely sealed up, shall be returned to, and securely fastened up in the box from which such ballots were taken and counted, and which shall also be sealed and labeled so as to show the nature of its contents, and shall be kept by one of the inspectors for sixty days; and then the packages shall be taken out of the box, without opening or unsealing the packages, and destroyed, unless within that time, the inspector having them in custody is notified that the election of some officer for which the election was held will be contested, in which case he must preserve the box containing the ballots cast for such contestant until such contest is finally determined, or until such box is demanded by some other legally constituted custodian during such contest.

385 (289). **Statement and poll lists returned to county returning officer.**—The statement of votes and the poll list delivered to the returning officer of the precinct must be delivered to the returning officer of the county, within forty-eight hours after the election.

386 (290). **Compensation of returning officer, inspectors and clerks.**—The returning officer, the inspectors and the clerks shall each be entitled to one dollar and fifty cents; and the returning officer, in addition, to five cents per mile in going to, and returning from the county site, computing the distance from the place of holding the election; the several claims to be paid out of the county treasury, on proper proof of the service rendered, and to be preferred claims, payable from any money in the treasury not specially otherwise appropriated.

As amended, Feb. 10, 1881, p 39.

387 (291). **Vote of county estimated.**—On Saturday next after the election, at the hour of twelve, meridian, the returning officer of the county, in person or by deputy, and the judge of probate and clerk of the circuit court shall assemble at the court-house; or if there is no such judge or clerk, or if either of them fails to attend, or if either of them is interested by reason of having been a candidate at such election, his place must be supplied by a respectable freeholder or householder of the county; and if all such officers are of the same political party, then the returning officer of the county must summon three reputable persons, resident householders or freeholders of the county, members of the opposite political party, to attend at such time and place; and in the presence of such other persons as choose to attend, the board of supervisors shall make a correct statement, from the returns of the votes from the several precincts of the county, of the whole number of votes given therein for each officer, and the persons to whom such votes were given.

Leigh v. State, 69 Ala. 261.

As amended, Feb. 10, 1881, p. 122.

388 (292). **Declaration of result of election.**—Within ten days after ascertaining the result of an election of county officers, including members of the house of representatives of the general assembly, the board of supervisors must make, in writing, a public declaration of the result, stating the name of each officer elected, and the office to which he was elected. The declaration must be signed by at least two of the supervisors, and must be published by filing the original in the office of the judge of probate, and by posting a copy thereof at the court-house door, and at three other public places in the county.

389 (292). **Certificate of result of election sent to secretary of state.**—The board of supervisors must, as soon as they have ascertained the result of an election, make, on blanks furnished by the secretary of state, certificates stating the exact number of votes cast in the county for each person voted for, and the office for which such person was voted for, and file the certificates with the judge of probate, who must immediately forward such certificates, as to all other officers than the governor, secretary of state, auditor, treasurer, superintendent of education and attorney-general, to the secretary of state.

Feb. 10, 1881, p. 122.

390. Counting returns sent to secretary of state; proclamation of result.—All returns of elections required by law to be sent to the secretary of state, must, within fifteen days after an election, be opened and counted in the presence of the governor, secretary of state and attorney-general, or of two of them, and of the result of the election as thus ascertained, except as to officers provided for in section 388 (292), the governor must give notice by proclamation published in some newspaper at the seat of government.

391 (292). **Certificates of result sent to speaker of the house of representatives.**—The certificates of the board of supervisors, as to the election for governor, secretary of state, auditor, treasurer, superintendent of education and attorney-general, must be by the judge of probate forwarded to the governor for the speaker of the house of representatives, at least ten days before the time fixed for the next meeting of the gen-

eral assembly, and must be by the governor delivered, unopened, to the speaker on his election.

392 (293). **Poll lists and lists of registered voters to be filed in office of judge of probate.**—After having ascertained the result of an election, made declaration thereof, and made the certificates provided for in sections 389 (292) and 391 (292), the board of supervisors must file the poll lists and lists of registered voters in the office of the judge of probate, which shall be open to the inspection of any elector of the county.

ARTICLE V.

CERTIFICATES OF ELECTION BY SECRETARY OF STATE; OPENING RETURNS BY SPEAKER OF THE HOUSE, AND PROCLAMATION OF RESULT; FILING RETURNS; DECISIONS IN CASE OF TIE.

393 (294). **Certificates of election.**—It shall be the duty of the secretary of state, within ten days after receiving the returns of election from the probate judge of each county, to furnish, from a count of the actual vote cast, as the same appears by the returns certified to him, certificates of election to such persons as may be ascertained to be elected to any office in this state.

394 (295). **Speaker of house opens returns and proclaims result; returns, where filed.**—It shall be the duty of the speaker of the house of representatives, within the first five days of the session of the general assembly, in the presence of a majority of the members of the general assembly, to open the returns furnished him under section 391 (292), ascertain and proclaim the result of such election; after which such returns shall be filed and kept in the office of the secretary of state, subject to the inspection of any elector of the state.

395 (297). **Tie vote, and how decided.**—In all elections where there is a tie between the two highest candidates for the same office, for all precinct or county officers, it shall be decided by the sheriff of the county; and in case of the office of circuit judge, chancellor, or any state officer, it shall be the duty of the secretary of state, in the presence of the governor, and such other electors as may choose to be present, to decide the tie by lot.

CHAPTER 4.

CONTESTING ELECTIONS.

ARTICLE 1.—What elections may be contested, and by whom; on what grounds, and general provisions in relation thereto.

2.—Contesting elections of members of the general assembly.

3.—Contesting elections of offices filled by the vote of a single county, except members of general assembly, and judges of probate, and justices and constables.

4.—Contesting the election of judge of probate.

5.—Contesting the election of circuit judge.

6.—Appeals and fees to officers.

ARTICLE I.

WHAT ELECTIONS MAY BE CONTESTED, AND BY WHOM; ON WHAT GROUNDS, AND GENERAL PROVISIONS IN RELATION THERETO.

396 (302). **Who may contest elections, and on what grounds.**—The election of persons declared elected to any office, whether state, county, representatives in congress, or to any office which may be filled by a vote of the people, may be contested by any qualified elector for any one or more of the following causes:

1. Malconduct, fraud, or corruption on the part of any inspector, clerk, returning officer, or board of supervisors.

2. When the person, whose election to such office is contested, was not eligible thereto at the time of such election.

3. On account of illegal votes.

4. Offers to bribe, or bribery, or any other misconduct calculated to prevent a fair, free and full exercise of the elective franchise; but no person shall contest the election of any person on account of race, color, or previous condition of servitude.

Clark v. Jack, 60 Ala. 302; Leigh v. State, 69 Ala. 261.

397 (303). **Statement by contestant, and contents.**—Whenever any elector chooses to contest any election, he must make a statement in writing, setting forth specifically,—

1. The name of the party contesting, and that he was a qualified voter when the election was held.

2. The office which such election was held to fill, and the time of holding the same.

3. The particular ground or grounds of such contest; which statement must be verified by the oath of the contesting party, or some one for such party, to the effect that he believes the same to be true.

398 (304). **Security for costs.**—The party contesting, except as hereinafter provided, must give sufficient security for the costs in such sum as the judge of the court in which the contest is to be tried, may deem sufficient, but in no case to exceed five hundred dollars.

McDuffie v. Cook, 65 Ala. 430.

399 (305). **Notice of grounds of contest.**—No testimony must be received of any illegal votes or other grounds of contest, unless the party contesting has given to the adverse party notice in writing of the cause, or causes, which he expects to prove on the trial, which notice must be served personally, at least ten days before the trial.

400 (306). **Either party to have copy of poll list, which is competent evidence.**—It shall be the duty of the judge of probate to deliver to either party, on his application, copies of the poll lists which have been filed in his office, on being paid his fees therefor; and on the trial of the contest, the precinct inspectors shall be required, by subpœna duces tecum, to produce the original poll lists and ballots filed and kept by them for examination, which shall be prima facie evidence of the fact that the person named in the poll list voted.

401 (307). **Voters may be examined as to qualification, without prosecution.**—Any person examined as a witness may be required to answer whether he voted at such election, and to answer touching his qualifications, except as to his conviction for any offense which could disqualify him. If he was not a qualified voter at such election, he may then be required to answer for whom he voted. In case of the prosecution of any such witness for illegal voting, his answers to such questions shall not be admitted as evidence against him.

402 (309). **Testimony to be by deposition.**—The testimony in such contests shall be by deposition, either on interrogatories or subpœna. The commission shall be issued by the clerk of the court, or officer performing the duties of the clerk of the court in which the trial shall be had, on application of either party without affidavit.

403 (310). **Interrogatories; how deposition taken.**—If the deposition is to be taken on interrogatories, a copy thereof, before issue of the commission, shall be served on the adverse party, or his attorney of record, and five days allowed for filing cross interrogatories, and two more for rebutting. The same proceedings shall be had, as nearly as may be, in taking and certifying the deposition as in other cases at law. The commissioner shall give the adverse party, or his attorneys of record, five days' notice of the time and place of taking the deposition.

404 (311). **Failure of witness to attend.**—If any witness, being summoned, fails to attend, the commissioner must certify the same on the back of the subpœna, and return the same to the next circuit court of the county in which such witness was summoned to appear, which court must proceed against him as against other defaulting witnesses in such court, the return of the commissioner being presumptive evidence of his default.

405 (312). **Testimony; how certified, indorsed and sealed up.**—All testimony taken in contests of elections must be certified, indorsed and sealed up, as is required in taking depositions in suits at law.

406 (313). **Compensation of witnesses and commissioners.**—Such witnesses and commissioners are to be allowed the same compensation as is allowed to witnesses and commissioners upon the execution of commissions from courts of law, to be taxed as hereinafter provided.

407 (314). **Jurisdiction denied courts of chancery in election contests; appeal in such cases.**—No jurisdiction exists in, or shall be exercised by any chancellor, chancery court, or any officer exercising chancery powers, to entertain any cause or proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority so to do shall be specially and specifically enumerated and set down by statute; and any injunction, process, order, or decree from any chancellor, chancery court, or officer in the exercise of chancery powers, whereby the results of any election are sought to be inquired into, questioned, or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void, and shall not be enforced by any officer, or obeyed by any person; and should any chancellor or other officer hereafter undertake to fine, or in any wise deal with any person for disobeying any such prohibited injunction, process, order, or decree, such attempt shall be null and void, and an appeal shall lie forthwith therefrom to the supreme court then sitting, or next to sit, without bond, and such proceedings shall be suspended by force of such appeal; and the notice to be given of such appeal shall be five days.

ARTICLE II.

CONTESTING ELECTION OF MEMBERS TO THE GENERAL ASSEMBLY.

408 (315). **Security for costs by elector.**—When any elector contests the election of a senator or representative to the general assembly, he must first give security for the costs of such contest, which must be acknowledged before, and approved by the clerk of the circuit court of any county of the senatorial district, if such contest be of the election of a senator, or, if the election of a representative, by the clerk of the circuit court of the county in which such election was held.

409 (316). **Notice of contest, its contents and service.** The contesting party must give notice to the person whose election is contested, by having served on him, or left at his usual place of residence, by the sheriff or some constable, a copy of the grounds of contestation and affidavit required by the provisions of section 397 (303).

410 (317). **Time of giving security for costs and notice.** The security for costs must be given, and the person whose election is contested must be notified in the mode prescribed, within twenty days after he is declared elected.

411 (318). **Return of statement and affidavit; evidence of service.**—The original statement of the grounds of contest and affidavit must, after such service, be returned to the office of the clerk of the circuit court, in which security for costs has been given, with the return of the officer indorsed, which is presumptive evidence of the service.

412 (319). **Manner of executing and returning commission.**—All testimony, taken in contests of election under this article, must be certified, indorsed and sealed up as is required in taking depositions in suits at law; must be directed to the

presiding officer of that branch of the general assembly before which such contest is to be tried, at the seat of government, and deposited in the nearest post-office.

413 (320). **Costs of contest; how taxed, certified, collected and paid.**—On the determination of such contest, the secretary of the senate, or clerk of the house, as the case may be, must tax the costs due to the commissioners, witnesses, the sheriff and other officers for serving notices and subpœnas, as for similar services in courts of law, and certify the amount of each separate item, the name of the person entitled thereto, and the result of such contest, to the clerk of the circuit court in which security for costs is required to be given by the provisions of this article; and the clerk of such court must thereupon issue execution in favor of the successful party for the amount of such costs, specifying the items, the amount of each, and the person entitled thereto, in the bill of costs, which execution must be made returnable to the term of the circuit court of such county next after its issue, and may be issued as often as may be necessary, and must, when collected, be paid by the officer collecting, on demand, to the parties entitled thereto.

414 (321). **Execution against contestant and sureties, if unsuccessful.**—If it be certified that the determination of the contest was against the party contesting, such execution must issue against such party and his sureties for costs.

415 (322). **Clerk's fees for executions.**—The clerk is entitled to one dollar for issuing the first execution, and fifty cents for issuing each alias execution.

ARTICLE III.

CONTESTING ELECTIONS TO OFFICES FILLED BY THE VOTE OF A SINGLE COUNTY, EXCEPT MEMBERS OF THE GENERAL ASSEMBLY AND JUDGES OF PROBATE, AND OF JUSTICES AND CONSTABLES.

416 (323). **Filing of grounds of contest and appointing day for trial.**—Any elector choosing to contest any election for any office which is filled by the vote of a single county, except for members of the general assembly and judge of probate, or to contest any election for justice or constable, must, within fifteen days after such person is declared duly elected, present a statement of the grounds of contest, verified by affidavit, as required by section 397 (303), to the judge of probate of the county in which such election was held, who must appoint a day, not less than fifteen, nor more than twenty days from the time of such presentation, for the trial thereof, and indorse the same on such statement.

417 (324). **Security for costs to be given by contestant.** He must also, at the same time, give security for the costs of such contest, to be approved by such judge; but in no case shall such judge require security for more than five hundred dollars.

418 (325). **Service of notice of contest.**—A copy of such statement, with the day of trial indorsed thereon, must be served on the person whose election is contested, or left at his usual place of residence, at least ten days before the day ap-

pointed for trial, by any sheriff or constable, and the original notice returned to such judge, with the mode of service indorsed thereon. This return is presumptive evidence of the service.

419. (326). **Witnesses summoned.**—After the notice required has been given, either party is entitled to subpœnas to compel the attendance of witnesses on the day fixed for the trial, which must be issued, on application, by the judge of probate before whom the contest is to be tried.

420 (327). **Proceedings against defaulting witnesses.**—The same proceedings may be had against defaulting witnesses as in matters litigated in courts of probate; such proceedings being returnable to any regular term of such court held within three months after such proceedings are taken.

421 (328). **Depositions, when taken.**—Testimony may also be taken by deposition in such cases, and in like manner as in matters litigated in the probate court.

422 (329). **Pay of witnesses and commissioners; continuances.**—The witnesses and commissioners are entitled to the same compensation as in other cases; and the court may, for good cause, continue the trial to some other day; but no continuance must be over thirty days, and such trial must not be continued more than twice on the application of the same party.

423 (330). **Judge of probate to examine evidence and render judgment.**—Such judge of probate has authority to make an examination of the ballots given in such election, so far as the same may be necessary to arrive at a correct judgment, and must be governed, in the trial and determination of such contest, by the rules of law and evidence governing the determination of questions of law and fact in the courts of law in this state, so far as the same are applicable; and, after hearing the allegations and evidence, must give judgment, either confirming or annulling such election altogether, or declaring some other person than the one whose election is contested duly elected. In all contests of elections for the office of justice of the peace or constable, or for any office which is filled by the vote of a single county, except for members of the general assembly, the person whose election is contested is entitled to a trial by jury, the issue to be made up under the direction of the court, and a jury summoned as in cases in the probate court.

424 (331). **Successful party entitled to commission.**—If it appears that any other person than the one whose election is contested received the highest number of legal votes, judgment must be given declaring such person duly elected; which judgment, if it be in relation to an officer entitled to a commission, must be certified to the secretary of state, who must commission such person; and such judgment has the effect of depriving the person whose election is contested of all right or claim to such office, and of investing the person declared by such judgment duly elected with the right to the same.

425 (332). **Proceedings in case tie vote is ascertained.**—If it appears that two or more persons have received an equal number of legal votes for such office, the trial of such contest

must be temporarily adjourned, and such result certified to the sheriff of the county in which such election was held, and he must give the casting vote in such case; and the casting vote being given, judgment must be rendered, declaring such person to whom such vote is given elected; and if such person is not the one whose election is contested, the judgment must be certified to the secretary of state, and such person commissioned as under the preceding section.

426 (333). **If person elected ineligible, office declared vacant; vacancy, how filled.**—If the person whose election is contested is proved to be ineligible to office, judgment must be rendered, declaring the election void as to such office and the office vacant, which vacancy shall be filled as is now provided by law.

427 (334). **Costs when the election is declared void, or the contestant is successful.**—When the election is declared void, or when any other person than the one whose election is contested is declared elected, the party contesting recovers of the person whose election is contested all costs, for which execution may issue, returnable to any regular term of the court of probate within three months after its issue.

ARTICLE IV.

CONTESTING THE ELECTION OF JUDGES OF PROBATE.

428 (335). **Institution of contest; by whom tried.**—To contest any election for the office of judge of probate, the party contesting must file his grounds of contest in the office of clerk of the circuit court, and give security for the costs, to be approved by the clerk of the circuit court of the county in which the election was held; the contestant must make the statement of the grounds of such contest and give notice to the person whose election is contested, in the mode prescribed in sections 397 (303) and 409 (316). Such contest must be heard and decided by the judge of the circuit court of the county where the election was held; and the rules of procedure prescribed by the preceding article, so far as applicable, shall govern in such contests.

McDuffie v. Cook, 65 Ala. 430.

ARTICLE V.

CONTESTING THE ELECTION OF CIRCUIT JUDGES.

429 (336). **On statement presented, chancellor to fix time and place.**—The party choosing to contest any election for the office of circuit judge must, within twenty days after the person whose election he contests is declared elected, present the statement of the grounds of contest, as required by section 397 (303), to the chancellor of the division in which such election was held, who must appoint a day of trial, not less than thirty, nor more than fifty days from the day of such presentation, and a place of trial, which must be at some place in the circuit

in which such election was held, and at which a court of chancery is required to be held, which day and place of trial must be indorsed on such statement.

430 (337). **Service of statement; return, and security for costs.**—Upon filing security for the costs of such contest, and the approval thereof by the register, a copy of the statement, with the indorsement thereon, must be served on the person whose election is contested, or left at his usual place of residence, by a sheriff or constable, at least twenty days before the day appointed for the trial, and returned to the register in the chancery district in which the same is to be tried.

431 (338). **What provisions of this chapter apply to this article.**—The provisions of this chapter, in relation to contested elections, shall apply to all contests for the office of circuit judge, to be tried before the chancellors of this state, so far as the same are applicable.

ARTICLE VI.

APPEALS IN CONTESTS OF ELECTION AND FEES TO OFFICERS.

432 (339). **Appeals to circuit and supreme courts.**—In contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried de novo; and in all cases before the chancery or circuit court, an appeal lies to the supreme court, to be heard on the record; but such appeals must be taken within twenty days.

433 (340). **Security for costs of appeal and judgment therein.**—Before taking an appeal, the appellant must give bond and security for the cost thereof, to be approved by the judge of probate, register, or clerk of the circuit court, but in no case shall the appeal bond be required for more than one thousand dollars; and the names of the sureties must be certified with the record to the appellate court, and if the decision is against the appellant, the clerk of the appellate court may issue execution for the costs of the appeal against such sureties.

434. (341). **Fees of officers.**—The judge of probate shall be entitled to three dollars for each trial of contested elections, and for such other services in such contest, the judge of probate, sheriff, and other officers are entitled to the same compensation as for like services in the circuit or chancery courts, to be taxed as costs against the unsuccessful party.

CHAPTER 5.

ELECTORS OF PRESIDENT AND VICE-PRESIDENT.

435 (342). **To be elected by general ticket, and when.** On the day prescribed by this Code, there are to be elected, by general ticket, a number of electors for president and vice-president of the United States, equal to the number of senators and representatives in congress to which this state is entitled at the time of such election.

436 (343). **Supervisors make return to secretary of state.** In all elections for electors for president and vice-president, the board of county supervisors of each county must, within five days after making the statement of the county vote, return the result of the same to the secretary of state.

437 (344). **Governor estimates returns and gives notice of election.**—Within fifteen days after the time for making the returns, the governor, in the presence of the secretary of state and attorney-general, or either of them, in the absence of the other, must estimate the returns, ascertain who are elected, and notify them by proclamation.

438 (345). **In case of tie, governor gives casting vote.** If, on such estimate, it is found that an election of the number of electors to which the state is entitled is not made, by reason of two or more persons having received an equal number of votes, the governor must forthwith decide between those having an equal number of votes.

439 (346). **Electoral meeting and supply of vacancies.** The electors of president and vice-president are to assemble at the seat of government, at ten in the morning, on the first Wednesday in December next after their election, or at that hour on such other day as may be fixed by congress, to elect such president and vice-president; and those of them present at that hour must at once proceed, by ballot and plurality of votes, to supply the places of those who fail to attend on that day and hour.

440 (347). **Compensation of electors.** — Each elector for president and vice-president shall receive eight dollars for each day he necessarily attends at the seat of government, and twenty cents for every mile traveled to and from the same, to be estimated in the same manner as is provided by law in relation to members of the general assembly from his county, to be paid, on oath of such elector, by a warrant on the state treasurer.

CHAPTER 6.

ELECTIONS IN NEW COUNTIES, UNTIL ENTITLED TO A SEPARATE REPRESENTATION, FOR CONGRESS AND MEMBERS OF THE GENERAL ASSEMBLY.

441 (348). **New county; suffrage, representation.**—Every new county, as to the right of suffrage and representation in elections for the general assembly and for congress, is to be considered as part of the county or counties from which it was taken, until the right of separate representation is given by act of the general assembly.

442 (349). **Right of elector to vote in new county.**—No elector can vote at any precinct in any new county, for representative in congress, or members of the general assembly, until an act of the general assembly is passed, giving to such county a separate representation, unless such elector would have been entitled to vote at such precinct for such officers before the formation of such new county.

443 (350). **Returns of elections to congress and general assembly in new county.**—The inspectors and returning officers of each election precinct in any new county must, until such county is entitled to a separate representation, make returns of the elections of representatives in congress and members of the general assembly, to the returning officer of the county in which such precinct was situated before the formation of such new county; for all other officers, the returns must be made to the returning officer of such new county.

CHAPTER 7.

ELECTIONS ON AMENDMENTS TO THE CONSTITUTION.

444 (351). **Vote on amendments.**—If any amendment to the constitution shall be duly proposed by the general assembly and published, as the general assembly shall direct, at least three months before the next general election for representatives, for the consideration of the people, it shall be the duty of the several returning officers to open a poll for vote thereon at such general election. The electors shall vote by ballot, on which shall be written or printed, "for amendment," or "against amendment," as the case may be; but the same ballot must be used as that used for election of representatives. If there is more than one amendment proposed, the elector may vote for one and against another, by specifying on the ballot the amendment voted for, and the amendment voted against. Numbering the amendments according to their order in the above prescribed official publication shall be a sufficient specification.

445 (352). **Counting the votes; return.**—The vote on an amendment shall be counted and return made thereof, as is counted and returned the vote for members of the general assembly, the amendments, if more than one, being distinguished by their numbers, as in the preceding section.

446 (354). **Returns made to secretary of state.**—The board of supervisors shall ascertain the number of votes given in their respective counties for and against the proposed amendment, when ascertaining the vote given for officers; the returning officers of such county shall thereupon make return of such vote to the secretary of state immediately, together with a certificate, prepared from the poll lists, of the total number of qualified electors in said county who voted at such election.

447. Returns counted; proclamation of result.—The secretary of state shall, in the presence of the governor and attorney-general, or of one of them, open such certificates and therefrom ascertain whether a majority of all the qualified electors of the state, who voted at such election, voted in favor of such amendment or amendments; and the result of said election shall be made known by proclamation of the governor.

CHAPTER 8.

PENALTY AGAINST OFFICERS FOR FAILURE TO MAKE RETURNS TO SECRETARY OF STATE AND SPEAKER OF THE HOUSE OF REPRESENTATIVES.

448. (3372). **Penalty declared.**—If any officer required to make returns of any election to the secretary of state, or to the speaker of the house of representatives, fails to make such return within the time prescribed, he forfeits to the state five hundred dollars, recoverable by motion to be made by the solicitor of the proper circuit, in the name of the state, in the circuit court of the county of such returning officer, upon three days' notice of such motion; and the certificate of the secretary of state, or of the speaker of the house of representatives, as the case may be, setting forth that such return has not been received, is presumptive evidence of the failure of such officer to make such return.

449 (3373). **Notice to be given solicitor of failure.**—Whenever the return of any officer, required to be made to the secretary of state, or to the speaker of the house of representatives, is not received within the time prescribed, the secretary of state or speaker of the house of representatives must give notice thereof to the solicitor of the proper circuit, and furnish him with the certificate specified in the preceding section.

TITLE VII.

TAXATION.*

CHAPTER 1.—Definition of terms.
2.—Exemptions from taxation.
3.—Subjects, rates, maturity and lien of taxes.
4.—Assessment of property and other subjects of taxation.
5.—Collection of taxes.
6.—Rights and remedies of purchasers of land at tax sale; statute of limitatations.
7.—Redemption of lands sold for taxes; sales by the state.
8.—General duties of auditor in supervising the enforcement of the revenue laws; miscellaneous provisions.
9.—Licenses.

CHAPTER 1.

DEFINITION OF TERMS.

450. Meaning of words and phrases.—Whenever the terms mentioned in this section are employed in this title, they are employed in the following sense:

1. The term "real property" shall be held to mean and include not only land, city, town and village lots, but also all things thereunto pertaining, and all structures and other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot.

2. The term "personal property" shall be held to mean and include all things, other than real property, which have any pecuniary value, and moneys, credits, and investments in any bonds, stocks, joint stock companies, or otherwise.

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* On February 28th, 1885, an act was approved, amending "sections 6, 10, 16, 22, 24, 26, 27, 29, 33, 35, 39, 40, 41, 44, 46, 48, 49, 51, 53, 58, 65, 66, 67, 69, 70, 71, 73, 74, 75, 76, 77, 84, 87, 90, 97, 99, 103, 105, 111, 113, 116, 117, 119, 122, 127, 130, 131, and to repeal sections 43 and 123 of an act, entitled 'An act to provide for the assessment and collection of taxes for the use of the state, and the counties thereof, and to define the duties of officers engaged about the said assessment and collection of taxes,' approved February 17th, 1885."—Pamph. Acts 1886-7, p. 1. The act amended was re-arranged, and many of its provisions rewritten by the commissioners, thus rendering it impracticable for the commissioner supervising the publication of the Code to *substitute* "without codification," the provisions of the amending act for those in the Code even if his authority extended beyond the substitution of acts purporting, in express terms, to be amendments of sections of the Code of 1876. The length of the amending act, and the fact that the auditor is authorized and required to prepare and have published a code of the revenue laws of the state, are his reasons for not giving the amendments in a note.

On 11th December, 1886, an act was approved, amending "sections 4 and 11, and subdivision 8 of section 2, subdivisions 2, 5 and 6 of section 6, and subdivisions 2, 3, 4, 5, 6, 9, 10, 17, 18, 20, 29, 31, 32, 33 and 34 of section 14, and to repeal subdivision 8, of section 6, of an act entitled 'An act to levy taxes for the use of the state, and the counties thereof,' approved December 12th, 1884, and for other purposes."—Pamph. Acts 1886-7, p. 31. The joint committee, to whom was referred the work of the commissioners, rewrote the corresponding provisions of the new Code, incorporating therein, as indicated by their report to the general assembly, many, if not all of the amendments made by the act last noted.

3. The term "money," or "moneys," shall be held to mean and include gold, silver and other coin, bills of exchange, bank bills, or other bills or notes authorized to be circulated as money, whether in possession, or on deposit subject to the draft of the depositor, or the person having the beneficial interest therein, on demand.

4. The term "credit" includes every claim and demand for money, labor, merchandise, or other valuable things, and money and property of any kind secured by deed of trust, mortgage, or otherwise.

5. The word "person," or "party," or other word or words, importing the singular number, shall be held to include firms, companies, associations and corporations; and all words in the plural number shall apply to single individuals, in all cases in which the spirit and intent of this title require it; and all words importing the masculine gender also shall apply to females; and all words importing the present tense shall also apply to the future.

CHAPTER 2.

EXEMPTIONS FROM TAXATION.

451. Property and persons exempt.—The following property and persons shall be exempt from taxation: Ib. sec. 2.

1. All property belonging to the United States.

2. All bonds of the United States and of this state; all property, real and personal, of the state, and of the counties and municipal corporations in the state; all cemeteries, and all lots in incorporated cities or towns, or within one mile of any city or town, to the extent of one acre, and all lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; all school furniture and other personal property used exclusively for public school purposes; and all property, real or personal, to an extent not exceeding twenty-five thousand dollars in value, that may be used exclusively for agricultural or horticultural associations of a public character.

Swann v. State, 77 Ala. 545.

3. All the property of literary and scientific institutions and literary societies, when employed or used in the regular business of such institutions.

4. The libraries of ministers of the gospel, and all libraries other than those of a professional character, and all religious books kept for sale by ministers of the gospel and colporteurs.

5. All deaf mutes and insane and blind persons, and their property to the value of one thousand dollars.

6. From poll-tax, all persons permanently disabled, whose taxable property does not exceed five hundred dollars.

7. All family portraits.

8. The shares of the capital stock of any company or corporation, which is required to list its property for taxation in this state, shall not be assessed against the share-holders of such company or corporation.

9. The following property, to be selected by the head of each family, viz.: Household and kitchen furniture, not to exceed in value one hundred and fifty dollars; one yoke of oxen, one cart or wagon, two cows and calves, twenty head of stock hogs, ten head of sheep, all poultry, all agricultural products of the preceding year which are on hand, in the hands of the producer, on the first day of January thereafter; provisions and supplies on hand for the current year, for the use of the family and the making of the crop; all wearing apparel; all looms and spinning wheels, kept for use of the family; farming tools to the value of twenty-five dollars; tools and implements of mechanics to the value of twenty-five dollars; one sewing machine in each family, when the taxable property does not exceed two hundred and fifty dollars: *Provided*, that no property or subject of taxation shall be exempted from taxation, nor shall any credit, abatement, or deduction be allowed therefrom, unless such property or subject of taxation is entered by the tax-payer upon his assessment list, and returned by him, under oath, to the tax-assessor. *

Every asserted claim of exemption from taxation will be narrowly scanned by the courts.—Swann v. State, 77 Ala. 545.

CHAPTER 3.

SUBJECTS, RATES, MATURITY AND LIEN OF TAXES.

Ib. sec. 3

452. Poll-tax.—There shall be collected from every male inhabitant in this state, over the age of twenty-one years, and under the age of forty-five years, not exempt by law, the sum of one dollar and fifty cents, as poll-tax, which shall be applied exclusively in aid of the public school fund in the counties in which it is levied and collected.

Ib. sec. 5.

453. Subjects and rate of taxation.—For the use of this state, and to raise revenue therefor, there is levied an annual tax of sixty cents on each hundred dollars in value, upon the following property: †

1. Each and every piece, parcel, tract, or lot of land in this state, including therein all things pertaining to such land, and all structures and other things, so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as mineral, timber, or other interest, when such interest is owned by a person other than the owner of the surface or soil.

2. All wharves and wharf-boats, toll-bridges, ferries and turnpikes, and all passes, channels, or canals, where tolls are charged, and street railroads, printing-presses and materials.

* By act approved December 11, 1886 (Pamph. Acts, 1886–7, p. 757), it is provided, "That, on and after the first day of January, 1887, all cotton and other agricultural products, which were raised or grown during the preceding year, and which shall remain in the hands of the producers thereof on the first day of January of any year immediately succeeding that in which they were raised, shall be exempted from taxation."

† By act approved February 28, 1887 (Pamph. Acts 1886–7, p. 31), the rate of taxation on all property liable to taxation, is changed to "five and one-half-tenths of one per centum for the fiscal year ending September 30, 1888, and five-tenths of one per centum for each year thereafter."

3. All steamboats, vessels and water craft of every name and kind, excepting such as are engaged in foreign commerce, to be assessed and collected at the port in this state where such steamboats, vessels and water craft are enrolled, if practicable; otherwise, or if not enrolled at any port under the laws of the United States, then at any place or landing where the same may be found.*

4. All stocks of goods, wares and merchandise, the assessment to be upon the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business; and this shall include all goods, wares and merchandise kept on plantations, or elsewhere, or by railroad companies, or manufacturing companies, or other associations, corporations, or persons, for sale, or to be dealt out to laborers or employes for profit, or on account of their wages; and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequently to the first day of January of the current year, but in such case the tax shall be apportioned according to the date at which the business shall be commenced, so that if commenced after the first day of April, the tax shall be three-fourths of the tax for the whole year; if commenced after the first day of July, the tax shall be one-half of the tax for the whole year. If the person, association, or corporation carrying on such business shall fail to make return of the amount of stock, as herein provided, or if the assessor is not satisfied with the return made, the assessor, in order to make a proper assessment, may examine the insurance effected by such person, association, or corporation upon the stock so to be assessed, if the same can be ascertained, and may also, by inquiry of persons believed to have knowledge of the subject, inform himself of the probable average amount of such stock; and from such information he may assess the same upon the best judgment he can form.

5. All household furniture, libraries, jewelry, plate and silverware, ornaments and articles of taste, pianos and other musical instruments, paintings, clocks, gold, silver and other watches, and gold and other safety chains; all wagons and other vehicles, all mechanical tools and farming implements; all dirks and bowie knives, swords, canes, pistols and guns; all cattle, horses, mules, studs, jacks and jennets; and all hogs, sheep and goats.

6. All money hoarded, whether in the custody of the owner, or on deposit in bank or elsewhere; but this shall not include money on deposit by persons engaged in any regular business in this state for use in such business.

Varner v. Calhoun, 48 Ala. 178.

7. All moneyed capital, that is, all money loaned and solvent credits, or credits of value, from which credits the indebtedness of the tax-payer shall be deducted, and the excess only shall be taxed; and all money employed in the business of advancing or loaning on stocks, bonds, bullion, bills of exchange, or promissory notes, or in the purchase thereof, or in the discount of bills of exchange, promissory notes, or bonds, or in dealing in stocks, bonds, bullion, bills of exchange, or promissory notes.

* Amended February 26, 1887. See Acts 1886–7, p. 30.

whether by individuals, companies, corporations, or associations, except when the money so employed is otherwise taxed as capital.

Moog v. Randolph, 77 Ala. 597.

8. Each share of any bank, banking company, or association located within this state, whether held by residents or non-residents of this state, the same to be assessed and collected in the county and in the city, town, or village wherein such bank, banking company, or association is located, and not elsewhere, and to be paid by such bank, banking company, or association for the share-holders thereof. All shares of national banks or banking associations organized under the laws of the United States, according to the actual or fair market value of such shares, whether held or owned by residents or non-residents of this state, to be assessed and collected in the county and in the city, town, or village wherein such national bank or banking association is located, and not elsewhere, and to be paid by each such bank or banking association for the share-holders thereof. It shall be the duty of the cashier or president of every such national bank or banking association to make out and return under oath, on or before the fifteenth day of January, in each year, to the assessor of the county in which such bank or banking association is located, a list showing the total number of shares of the stock of such bank, the name and residence of the share-holders, as far as known, and the fair market value of such shares; and such president or cashier shall, at the same time, return to the assessor of the county a sworn statement of all taxable property, real and personal, situate in this state, and the value thereof, as assessed for taxation; and thereupon it shall be the duty of such assessor, after passing upon such assessment or assessments, to deduct from the amount or sum at which the whole of said shares are assessed the amount or sum at which the taxable real and personal property, situate in this state and belonging to such bank or banking association, is assessed for taxation; and the residue of values remaining after such deduction shall be the assessed value of the whole of such shares, and such residue, divided by the whole number of shares, shall constitute the value of each share for taxation. Such shares of stock, at the value so assessed, may be treated by the owner thereof as money loaned, solvent credits, or credits of value within the meaning of the law, and he shall be entitled to deduct his indebtedness from the assessed value thereof, in such manner, and under such regulations as may be from time to time prescribed by the auditor, not inconsistent with the true intent and meaning of this provision, which is to provide that the taxation upon such shares of stock shall not, in any manner, be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this state, and to guard against all unfavorable discrimination prohibited by the laws of the United States.

Maguire v. Board of Revenue, 71 Ala. 402; Pollard v. State, 65 Ala. 628; Sumter County v. National Bank, 62 Ala. 464.

9. The capital stock of all corporations, companies, or associations, created or existing under any law in force in this state, except such portions of the capital stock as may be invested in

property which is otherwise taxed as property, the same to be paid by the corporation, company, or association; but when such corporation, company, or association pays the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the share-holders, such corporation, company, or association shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed.

10. All investments in bonds, except bonds of the United States and of this state, and such other bonds as are not by law taxable; but all capital invested in bonds or currency which are exempt from taxation shall be liable to be taxed under this section, should such capital, at any time during the year, be reconverted into money, bonds, or property which is taxable, unless it is made to appear that the money, bonds, or property into which such reconversion may be made has been assessed for taxes for such year.

11. The road-bed, track and other property, real and personal, of railroads.

12. All dividends declared or earned, and not divided, by corporations doing business in this state.

13. All other property, real and personal, not otherwise specified herein.

Sumter County v. National Bank, 62 Ala. 464.

454. Other subjects of taxation and rates thereon.—There shall also be assessed by the assessor in each county for taxation the following subjects at the following rates: Ib. sec. 6.

1. On the gross amount of sales at auction, made in or during the tax year preceding the assessment of goods, wares and merchandise owned by non-residents, each auctioneer shall be assessed and shall pay a tax of one-fourth of one per cent.; and a like tax on all sales made by him of property owned by citizens of this state, which has been imported into the state and sold at auction before the same has been assessed for taxes as other property; but on sales of goods, wares and merchandise and fruits, by cargo, the rate of taxation shall be one-eighth of one per cent.

State v. Norton, 38 Ala. 222.

2. On the gross amount of premiums received by any life, fire, or marine insurance company, not chartered by this state, and doing business herein by agents or otherwise, from its business in this state during each tax year, after deducting therefrom the expenditures, losses paid and returned premiums, at the rate of one per cent. Each agent in this state of any insurance company, organized under the laws of any other state or country, and doing business in this state, shall annually, in the month of January, return to the assessor of the county in which such agency is located, a sworn statement of the gross receipts of such agency for the year ending on the first day of that month, including all notes, accounts and other things received or agreed upon as a compensation for insurance at such agency, with a statement of expenditures, losses paid and returned premiums; and the company shall be charged with taxes, at the place of such agency, on the amount so returned; and the agent shall also be personally responsible for such taxes, and may retain in his hands a

sufficient amount of the company's assets to pay the same, unless the same shall be paid by the company; but no corporation, not incorporated under the laws of the state, nor any foreign society, firm, or partnership shall do business in this state, except through an agent duly authorized and accredited for the purposes of said business, and for all purposes connected with licenses and taxation and service of process; said agent to be appointed by authentic act, and a certified copy of the act to be deposited in the office of the auditor of this state. Any person or firm, who shall fill up or sign a policy or certificate of insurance on open marine or fire insurance policy, or otherwise issue a policy by a corporation or association, or person not located or represented in this state by a legally authorized agent, shall be considered an agent of such corporation, or person, or association, and shall be liable for all licenses, taxes and penalties enforced, by the provisions of this title, upon such person, corporation, or association, as if represented by a legally appointed agent; and any agent or company, refusing or failing to make returns within the time prescribed by law, or refusing to pay the amount assessed as tax, shall forever be debarred from doing business in this state.*

3. On the gross amount of premiums received by any insurance company, other than a life insurance company, chartered by, or organized under any law of this state, from its business in this state during each tax year, less the expenditures, losses paid and returned premiums, one per cent.; on the gross amount of premiums received by any life insurance company chartered by, or organized under any law of this state, from its business in this state, during each tax year, less the expenditures, reserved fund, returned premiums and losses paid, one per cent.

4. On the gross amount of commissions, or sums charged and received during each tax year by any factor, broker, commission merchant, or other merchant or dealer in any kind of property, or auctioneer, in buying, selling, or for any other act in the course of his business, for a commission or compensation, by bale, sack, package, or otherwise, after deducting the expenses for carrying on such business, and on the gross commissions received by insurance agents, as such, during each tax year, at the same rate that property is taxed.

5. On the gross receipts during each tax year of all cotton pickeries, cotton-seed oil mills, and from the storage of cotton, or merchandise, or produce, and on the gross amount of income of all gas-works, electric light companies, water-works, ferries, toll-bridges, public mills and gins used in ginning for tolls, and cotton compresses, after deducting the expenses of carrying on such business, at the rate of one per cent.

6. On the gross amount of the receipts by any and every telegraph, telephone and express company, derived from the business done by it in this state, at the rate of two dollars on the hundred dollars.

7. On the gross income of sleeping-car companies, corporations, or associations, doing business, or running, or causing their cars to be run in this state, at the rate of two per cent., exclusively for the use of the state.

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* Rewritten by joint committee.

8. On the salaries, gains, incomes and profits of persons, partnerships and corporations in this state, on which no taxes have been assessed and paid for any year within the ten years preceding the 12th day of December, 1884, and which were liable to taxation under the law then existing, there shall be assessed and collected for each of such years, for which no taxes were assessed and paid thereon, a tax as provided in the law existing during each of such years, which shall be in lieu and in satisfaction of all liability of such persons, partnerships and corporations for such escaped taxes; and such salaries, gains, incomes and profits, if not returned for taxation, may be assessed by the assessor or collector as other escaped taxes are assessed.

Board of Revenue v. Montgomery Gas Co., 64 Ala. 269.

455. Return of notes and mortgages of building and loan associations.—Building and loan associations doing business in this state are not required to return, as part of their taxable property, notes and mortgages made and executed to them by their stockholders or members for purchases, loans, or advances on stock made at the distribution of the funds thereof, if the stockholders or members obtaining such purchases, loans, or advances pay the tax levied and assessed on the whole value of the property so mortgaged; otherwise, such associations must return for taxation the amount of their capital held by the stockholders or members on such purchases, loans, or advances, and also the average amount of money held by them during the year preceding that for which their assessment returns are made. Ib. sec. 7.

456. When foreign insurance company considered as doing business in state; taxes against.—When any person shall do or perform any of the acts, the doing or performing of which by him for any insurance company not organized under, or incorporated by the laws of this state, renders him the agent of such company under the provisions of this Code, such company shall be held to be doing business in this state, and shall be subject to taxation for state, county and municipal purposes, in this state; and such person so doing or performing any of such acts shall be personally liable for such taxes. Ib. sec. 17.

457. When taxes become payable; when delinquent. Unless otherwise provided, all taxes shall become due and payable on the first day of October of each year, and, if not paid, shall become delinquent on the thirty-first day of December of each year, except in cases where parties are about to remove from the county; but poll-taxes shall, if not paid, become delinquent on the first day of December of each year, on or after which last date, as to poll-taxes, the tax-collector may proceed to enforce the payment thereof by garnishment, or by seizure and sale of personal property, as provided for the collection of other delinquent taxes.* Ib. sec. 4.

458. Property brought into state after first of January; when taxable.—All property brought into the state after the first day of January, and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the state on the first day of January. Feb. 17, 1885, p. 21, sec. 2.

* Rewritten by joint committee.

Ib. sec. 136.

459. Lien of state and county for taxes.—From and after the first day of January of each year, the state shall have a prior lien upon each and every piece or parcel of property, real or personal, for the payment of the taxes which may be assessed against the owner, or upon such property, during that year, for the use of the state; and the county shall have a like lien thereon for the payment of the taxes which may be assessed against such owner, or upon such property, during that year, for the use of the county.

Driggers v. Cassady, 71 Ala. 529.

CHAPTER 4.

ASSESSMENT OF PROPERTY AND OTHER SUBJECTS FOR TAXATION.

ARTICLE 1.—Tax-assessor; election, bond, oath of office and compensation; deputies.

2.—General rules of assessment; and herein of duties of tax-assessor and of tax-payer.

3.—Assessments against railroad, telegraph, telephone, express and sleeping-car companies.

4.—Powers and duties of court of county commissioners, and duties of judge of probate touching assessments; levy of county taxes.

ARTICLE I.

TAX-ASSESSOR; ELECTION, BOND, OATH OF OFFICE AND COMPENSATION; DEPUTIES.

Feb. 17, 1885, p. 21, sec. 19.

460. Tax-assessor; election and term of office.—There shall be elected, at the time, in the manner, and for the term provided by law, a tax-assessor for each county in the state, who shall perform such duties as are, or may be prescribed by law.

Ib. sec. 20.

461. Official bond.—Before entering upon the discharge of the duties of his office, the tax-assessor must execute in duplicate a bond in the sum of two thousand dollars, payable to the State of Alabama, with sufficient sureties, to be approved by the judge of probate of his county, and conditioned faithfully to discharge the duties of his office which are, or may be required by law during the time he continues therein, or discharges any of the duties thereof. One of such duplicates must be filed and recorded in the office of the judge of probate, and the other must be filed in the office of the auditor.

Ib. sec. 21.

462. Oath of office.—He shall also, before entering upon the discharge of the duties of his office, file in the office of the judge of probate of his county an oath in writing that he will faithfully and diligently discharge all the duties which are, or may be imposed upon him by law; and such oath must also be recorded.

Ib. sec. 36.

463. Commissions.—He shall be entitled to receive from the tax-collector, out of the first moneys collected for the state, the following commissions upon the amount of state taxes assessed by him, for which he shall give to the collector receipts in duplicate, one of which the collector shall forward to the auditor, to-wit: In counties in which the state taxes assessed by him do

not exceed twelve thousand dollars, he shall receive commissions at the rate of eight per cent. on the first thousand dollars, four per cent. on the second thousand dollars, and two per cent. on the remainder; and in counties in which the state taxes assessed by him exceed twelve thousand dollars, he shall receive the same commissions as above provided, up to twelve thousand dollars, and one and one-half per cent. up to sixty thousand dollars, and one-half of one per cent. on the remainder. He shall also receive from the tax-collector the same rates of commission upon the amount of county taxes and of special taxes assessed and carried up or extended on the assessment-book, for which he shall give to the tax-collector receipts in duplicate. He shall also receive five per cent. on the amount of taxes assessed upon property which has escaped taxation in the assessments for previous years, if such assessments were not made while he was in office; but no such assessments shall be made on any property for any year preceding five years before the date when the assessment is sought to be made.

East v. Eichelberger, 69 Ala. 187.

464. On what not entitled to commissions; when collector to retain commissions.—He shall not receive commissions on errors made in assessments, or on abatements or deductions from assessments allowed to the tax-payer, whether such errors were ascertained, or such abatements or deductions were allowed before or after the tax-book has been turned over to the tax-collector; nor shall he, after such book has been turned over to the tax-collector, receive commissions on any assessment to which an objection by the tax-payer, regularly entered, may be then pending, until such objection has been disposed of, and the proper assessment ascertained and determined by the court of county commissioners; and if the commissions have been paid on any assessment before any error therein has been ascertained, or before the allowance of such abatement or deduction, he shall refund the same, upon notice from the tax-collector, and if not thus refunded, the tax-collector must retain the amount of the same out of any fees or commissions due, or to become due to the assessor; and the tax-collector shall also retain out of any fees or commissions due, or to become due to the assessor, the amount of commissions due and allowed to such collector on taxes which have escaped assessment while such assessor has been in office, and which such collector has assessed. Ib. sec. 36.

465. Commission on poll-tax.—The tax-assessor shall also be allowed a commission of three per cent. for making list and keeping book of poll-taxes, on the amount of such taxes, which shall be paid out of the poll-taxes collected; but no commissions shall be allowed him on polls which are declared to be errors by the court of county commissioners. Ib. sec. 37.

466. Fees to assessor.—For making the demand hereinafter in this chapter required of him, the assessor shall be entitled to charge each tax-payer of whom such demand has been made, fifty cents, to be entered upon the assessment of such tax-payer, which the tax-collector shall collect as he does the taxes, and pay the same over to the assessor; but the assessor shall only charge one fee against each tax-payer for making such demand, Ib. sec. 37.

although such tax-payer may be assessed a poll-tax and also a tax on property; and he shall be entitled to such other fees as may be expressly allowed to him by law.

Ib. sec. 30.

467. Appointment of deputies; liability for acts of deputies.—The tax assessor is authorized to appoint deputies, and the acts of such deputies shall be recognized as his acts, and he shall be responsible for any loss sustained by any tax-payer, or by the state or county, by reason of any unlawful act or assessment done or made by any of such deputies. Such deputies shall receive no compensation for their services out of the state or county revenue.

ARTICLE II.

GENERAL RULES OF ASSESSMENT, AND HEREIN OF DUTIES OF TAX-ASSESSOR AND OF TAX-PAYERS.

Ib. sec. 34.

468. Commencement and completion of assessment; supplemental assessment.—The assessment of taxes may commence on the first day of January, and shall be finished by the first day of July in each year; but the assessor may be allowed until the first Monday in August in each year to make a supplemental assessment upon property which he may have failed to assess prior to the first day of July; and such supplemental assessment he must enter in the original book of assessments as any other assessment; and the judge of probate shall embrace such assessment in his abstracts for the auditor and collector.

Ib. sec. 22.

469. Appointments by assessor, and notice thereof; effect of failure to give notice or attend.—The tax-assessor shall give at least twenty days' notice, by advertisement in some newspaper published in the county, if there be one, and by bills posted at five or more public places in each election precinct, of the time when, and of the place where he will attend to assess the taxes; and he shall visit each precinct, at the time and place designated in such notice, twice in each year, at least thirty days apart, and remain there one day each time, from eight o'clock in the morning until four o'clock in the afternoon, for the purpose of assessing the taxes in such precinct; and upon his failure to give the notice required by this section, or to attend any appointment made by him in any precinct, he shall, after like notice, fill new appointments, or forfeit all claims to fees from such persons as were disappointed by his non-attendance; but he shall not be entitled to any fees from such persons, if they fail to attend his second appointment.

Ib. sec 1.

470. Tax-payer to attend appointment and return list of taxable property.—It is the duty of every person liable to taxation in each election precinct, upon notice given as provided in the preceding section, to attend at the time and place designated in such notice, and render to the assessor in writing a complete list of all the items, and the value of each item, upon which he is liable to be taxed, as well as such items, and the value thereof, as may be exempt from taxation; and from such list the assessor shall make out the assessment, on which the tax-payer shall subscribe an affidavit, as hereinafter provided.

471. Demand of tax-payers failing to meet assessor at appointments.—After he shall have completed his appointments in each year, the assessor shall, in person or by deputy, make a demand upon such tax-payers as failed to meet him and return their lists at his appointments, wherever he may find them, for a list of their taxable property, and whenever unable to find them, he may leave a written demand at their residences or places of business; and it shall be their duty to return such lists to him by the first day of May following, at his office, or wherever he may be found. Ib. sec. 23.

472. When assessor may determine or increase values; notice of increase.—The valuation of any property by the tax-payer in his list or return shall, in no case, prevent the assessor from determining its true value by inspection, evidence, or information touching the same; and if he shall ascertain that the valuation of any item of property returned by the tax-payer is too small, he shall increase the same to its real market value; but when he does so, he shall notify the tax-payer in writing of his action before he makes his return to the judge of probate. Ib. sec. 1.

473. Full statement of subjects of taxation required of tax-payers.—Every person of full age and of sound mind, and every firm and body corporate or politic shall, when legally called on by the assessor, forthwith make to him a full, true and distinct statement of all the real and personal property, with a correct description thereof, of which he is the owner or holder, individually, or as guardian, parent, husband, trustee, administrator, executor, receiver, accounting officer, partner, agent, or factor, and including all moneys and credits so held or owned, or on deposit anywhere in the state, on the first day of January preceding, except as herein otherwise prescribed. Ib. sec. 2.

474. When sworn list may be sent in by another person. When a tax-payer resides out of the county, or, by reason of any infirmity or disability, is unable to attend the appointments of the assessor, or is a female, such tax-payer may send in his or her list, duly sworn to, by another person, or such list may be rendered by an agent having knowledge of his or her taxable property. Ib. sec. 3.

475. How values estimated; minerals and timber, when assessed separately.—Real and personal property shall be estimated at its value in money, according to the best judgment the assessor can form upon information, inspection, or otherwise, taking into consideration, if real estate, its location, whether in town, city, or country, and whether it is vacant and lying idle, or is occupied and in use, and if occupied and in use, the rent derived therefrom, its proximity to local advantages, its quality of soil, growth of timber, mines, minerals, quarries, or coal beds, and the amount and character of the improvements thereon; and mineral and timber interests, when they have been severed in ownership from the soil, by sale or otherwise, shall be separately assessed. Ib. sec. 134.

476. How real estate may be described.—The description of real estate may be as follows: Ib. sec. 7.

1. If it is an entire section, it may be described by the number of the section, township and range.

2. If it is a subdivision of a section, authorized by the United States for the sale of public lands, it may be described by a designation of such subdivision, with the number of the section, township and range.

3. If it is less or other than such subdivision, it may be described by metes and bounds, or in some way by which it may be known.

4. If it is in a city, town, or village, surveyed and laid off, and a plat thereof is recorded in the office of the judge of probate of the county, and it is a whole lot or block, it shall be described by the designation of the number thereof; and if it is a part of a whole lot or block, it may be described by metes and bounds, or in some other way by which it may be known; and it shall not be necessary to insert the quantity of such land in the assessment.

5. If it is a tract of which the subdivision is not known to the assessor, it may be described by metes and bounds, or in some other way by which it may be known or identified.

6. It shall be sufficient to describe lands to be assessed or sold for taxes by initials, abbreviations and figures.

Ib. sec. 8.

477. By whom property should be listed.—The property of every minor shall be listed by his guardian, if he has one; if he has no guardian, by his father, if living; if the father is dead, by his mother, if living; if the mother is also dead, or is married, by the person having it in charge; of the wife, by the husband, if living and sane, and the parties reside together; if the husband is dead or insane, or is not living with the wife, by the wife; of any person for whose benefit property is held in trust, by the trustee; of every deceased person, by the executor or administrator; of those whose property is in the hands of receivers, by such receivers; of every firm, or body corporate or politic, by the partner, president, principal officer, or agent thereof; property in the hands or custody of any public officer or appointee of a court, by such officer or appointee; of those absent or unknown, by their agents, or the person having it in charge; of insane or idiotic persons of full age, by their guardians, if they have any; if they have no guardian, by the person having it in charge; of the lessors of real property, by such lessors; and all persons herein required to list property for others shall list it separately from their own, and in the name of the owner thereof.

Ib. sec 9.

478. How property of corporations listed; when shareholders not required to pay on shares.—The taxable property of every corporation, not otherwise regulated as to taxation by the laws of this state, shall be returned to the assessor by the president or chief officer of such corporation, with the estimated value thereof; and in making such list or return, such officer shall state the market value of the capital stock of the corporation, and the items of property in which its capital is invested, with the value thereof, and the number of shares into which the capital stock is divided, with the par value and the actual market value of each of such shares; and if such corporation makes such list or return, and pays to the tax-collector the taxes assessed, or which would be by law due upon the property so listed or returned, then no tax on the shares into

which the capital stock of such corporation may be divided, shall be demanded or collected of the holders thereof.

479. Oath to be administered to tax-payer.—The tax-assessor, or his authorized deputy, must orally administer the following oath to every tax-payer before receiving his list or return: "You do solemnly swear that you will true answers make to the lawful questions which I may put to you touching the return you are about to make, and that you will make a true return of all the taxable property owned by you on the first day of January, at its market value, and of other subjects of taxation, to the best of your knowledge and belief; so help you God. Ib. sec. 5.

480. To what inquiries tax-payer subjected.—After administering such oath, the assessor may particularly inquire of the tax-payer, touching the items and details of property, and other subjects of taxation, of which he may be supposed to be in possession, and for which he may be liable to be taxed, and property exempt, and the value thereof, in order that he may elicit from the tax-payer a complete statement of the whole amount, and specific items of the property, and other subjects of taxation, which should be assessed against him. Ib. sec. 6.

481. When assessment of property made on information. If any tax-payer refuses to return a list of property and other subjects of taxation to the assessor, as required by law, or if the assessor is not satisfied that the list returned is correct, the assessor shall, from the best information he can obtain from any source within his reach, make such assessment of the property and subjects of taxation, to be charged against such tax-payer, as may seem to him just and right. Ib. sec. 6.

482. When assessment of receipts made on information; penalty.—When any person, or any company, corporation, or association, existing under the laws of this state, or under the laws of any other state or country, doing business in this state, is required to make to the assessor returns of the gross or net receipts of such business, and such returns are not made within the time required by law, but shall remain in default for the space of ten days thereafter, the assessor, after notice to the party required to make such returns, or if he is absent from the county, without notice, shall, upon the best information which he can obtain, ascertain the probable amount of such receipts, and shall assess to the person, company, corporation, or association, so in default, the amount so ascertained, with fifty per cent. thereon as a penalty; and the amount so assessed, including the penalty, shall be the amount on which the tax levied by law shall be collected. Ib. sec.

483. Assessments made on information after 1st May. The assessor, having failed to procure from any tax-payer a return of his list before the first day of May, in any year, shall ascertain from inquiry, or otherwise, the property and other subjects of taxation, upon which such tax-payer is liable to be taxed, and make an assessment against him, according to the best of his information and judgment; and such assessment shall be entered in a book kept for that purpose. Ib. sec. 26.

484. Assessments to unknown owners; how made and fees therefor.—Whenever the assessor, while performing the duties of his office, knows or learns of any property, real or Ib. sec. 25.

personal, subject to taxation in his county, the owner of which he does not know, and cannot ascertain, and which is not embraced in any return made to him by any tax-payer, he shall assess the value thereof to "owner unknown," according to the best information which he can obtain, in all respects in the same manner as he is required to make assessments of property to persons who do not make returns of their property to him; and such assessments shall be entered and returned, as is required in case of assessments made on the returns of tax-payers; and the assessor shall be entitled to the same fees for making such assessments as for demands made by him on tax-payers.

Ib. sec. 31.

485. Assessment of escaped taxes.—Whenever the assessor, while assessing the property and other subjects of taxation in his county, shall discover that any person or property has escaped taxation in any previous assessment or assessments within five years next preceding, he shall assess the taxes against such person, or on such property, for the years during which such person or property has so escaped taxation.

Ib. sec. 24.

486. Form and contents of assessment list; tax-payer entitled to copy; affidavit thereon.—The taxable property, and other subjects of taxation, and the property exempt from taxation, shall be entered, or caused to be entered by the assessor, upon a blank assessment list in the form of an account, showing each item of taxation assessed, amount and value of each item as valued by the tax-payer, or as ascertained by the assessor, and the amount of deductions to which the tax-payer is entitled, a certified copy of which the assessor shall, on demand, furnish to the tax-payer; and the tax-payer, or his agent, making the return to the assessor, shall make and subscribe an oath in writing, on or appended to such list, that such list contains a full and true statement of the property and other subjects of taxation with which he is chargeable, and of the value thereof.

Ib. sec. 27.

487. Condensed statement of assessment and polls entered in books by assessor.—The assessor must make and enter in a book, suitably ruled and substantially bound, a condensed statement of all assessments made during each tax year, showing, in separate columns, the names of persons assessed in each precinct, in alphabetical order, the number of acres of land and other real estate, and the value thereof, and the number, amount and value of all other taxable property, and subjects of taxation assessed to each person, and property exempt from taxation; and the number, amount and value of each separate item entered therein, together with the amount of the state tax charged to each tax-payer, shall be extended and footed up, the footings carried forward, from page to page, and the total amounts thereof footed up; and the assessor shall also keep and enter in a suitable book a list, alphabetically arranged, of all persons liable to poll-tax in each precinct.

Ib. secs. 35, 34, 27, 24.

488. Books and lists to be delivered to judge of probate. On or before the first Monday in July of each year, the assessor shall deliver to the judge of probate of his county such assessment book and poll-tax book, and also all assessment lists, other than supplemental assessment lists, and take a receipt therefor; and such books and lists shall be open for the inspection and examination of all persons; and all supplemental assessment lists he shall deliver to such judge of probate, on or before the

second Monday in August of each year, which shall also be open to the inspection and examination of all persons.

489. Grounds of suspension by governor; appointment of commissioner during suspension.—If any tax-assessor, without good and sufficient excuse, to be decided by the governor, fails to comply with any of the provisions of the preceding section, he shall be suspended by the governor from the further performance of the duties of his office, and shall remain suspended unless the general assembly, by joint resolution, restore him to office; and on such suspension, the governor shall appoint a tax commissioner, who shall continue in office during such suspension, and who, after giving the bond and taking the oath of office required of tax-assessors, shall assess the taxes of the county, and perform all the other duties pertaining to the office of tax-assessor, and shall be subject to the same rules, requirements, responsibilities, penalties and liabilities as are made for, or imposed upon tax-assessors; and to such commissioner, on his qualifying by giving bond and taking the oath of office, the assessor shall deliver the books and papers of his office. Ib. sec. 35.

490. What noted on list and poll-tax book.—The assessor, each year while making his assessments, shall note in the poll-tax book, and on the assessment lists the township and range in which each person liable for poll-tax resides; and he shall also note in the poll-tax book the number of each race in each township liable to poll-tax. Ib. sec. 28.

491. Assessor to make list of all lands in county.—The assessor shall annually make out a complete list of all the lands in his county, subject to taxation, in a book properly ruled and bound, beginning with the lowest section, township and range, and proceeding in numerical order to the highest, and setting opposite each division and subdivision of sections the name of the reputed owner thereof, and, when the owner is not known, the words "owner unknown." Ib. sec. 29.

492. Duty when tax-payer about to leave county.—When the assessor has reason to believe that any person who has been assessed is about to leave the county, he shall at once notify the tax-collector, and on his failure to do so, he shall be liable for the full amount of the taxes due, or to become due upon such assessment. Ib. sec. 32.

493. Duty to compute and enter county taxes and complete assessment book.—After the county taxes shall have been levied by the court of county commissioners, the assessor must compute the amount thereof owing by each tax-payer, and enter the same in the book of assessments opposite the name of such tax-payer, and otherwise complete such book according to law and the orders of the court of county commissioners. Ib. sec. 27.

ARTICLE III.

ASSESSMENTS AGAINST RAILROAD, TELEGRAPH, TELEPHONE, EXPRESS AND SLEEPING-CAR COMPANIES.

494. Return to be made by railroad companies to auditor. On or before the first day of April of each year, the president, secretary, or auditor of any railroad company whose track or Ib. sec. 11.

road-bed, or any part thereof, is in this state, or if such railroad is in the hands of a receiver, such receiver shall, under oath, make to the state auditor a return in writing of the total length and value of such railroad, including the right of way, road-bed, side-tracks and main track in this state, and specifying the total length and value thereof in this state, and in each county, city and incorporated town in this state; and also of the number and value of the locomotive engines, and passenger, freight, platform, construction and other cars of such company, and of the average amount and value of merchandise and supplies kept or carried on trains for sale, or other disposition for a profit by such company to employes or other persons in this state, for the year next preceding the return; and such return the auditor shall lay before the state board of assessment at its next meeting thereafter.

Auditor v. Jackson County, 65 Ala. 143; Perry County v. Railroad Co., Ib. 391.

Ib. sec. 12.

495. Duty of auditor on failure to make such return. If such return is not made on or before the first day of April of each year, the auditor shall proceed to ascertain the items and values in the preceding section mentioned from the best information he can obtain, and report the same to the state board of assessment at its next meeting thereafter.

Ib. sec. 13.

496. State board of assessment.—The governor, secretary of state, auditor and treasurer of the state shall constitute a board for the assessment of the items of property of railroad and other companies required to be returned to the auditor, to be known as the State Board of Assessment. The governor shall be president of such board, and a majority thereof shall constitute a quorum.

Auditor v. Jackson County, 65 Ala. 143; Assessment Board v. A. C. R. R. Co, 59 Ala. 551.

Ib. sec. 13.

497. Meetings of such board.—Such board shall meet at the office of the auditor annually, on the first Wednesday in May; and if there should not be a majority of the board present at that time, the auditor shall immediately notify the governor of the fact, who shall appoint another day for the meeting of the board, as early as practicable thereafter, and of such appointment the auditor shall notify the other members and the attorney-general; and should any further failure to meet occur, the governor shall have power, and he is required to repeat the appointment until a quorum is obtained; and of such subsequent appointment like notice must be given by the auditor.

Ib. sec. 13.

498. Assessment by board; penalty for failure to make return.—The board, when assembled, if ready to act, shall proceed to examine the returns made by railroad companies, and the reports of the auditor, when no such returns have been made, and determine the valuation of the different items of property required to be returned to the auditor, and to assess such property for taxation; and in case no return has been made by, or on behalf of any of such railroad companies, the board may add to the assessment which it may make against such company, a penalty of not exceeding fifty per cent. thereon.

Ib. sec. 13.

499. Adjournment of board; powers touching obtaining data for assessments.—If, at any meeting, the board should not

have in its possession satisfactory data upon which to base an estimate of the value of the property with the assessment of which it is charged, or, from any other cause, is not able to make or complete any assessment, it may adjourn for any interval of time which may, in its opinion, be requisite to accomplish its object; and it shall have power to call upon any officer or agent of any railroad company, or upon any receiver in charge of the railroad of any company, for any records, books, or documents of any description pertaining to the business of such company, or for answers to any interrogatories which it may deem necessary to an intelligent discharge of its duties; and it shall also have power to require the attendance of any officer of any railroad company, or any other person, where the testimony of such officer or person may to it seem material.

500. Attendance and duty of attorney-general at meetings of board.—The attorney-general shall be present at every meeting of the board, to represent the interests of the state; and it shall be his duty to assist the board with his advice, or otherwise, and to make such suggestions and representations to it as he may deem advisable for the protection of the interests of the state; and his absence shall be sufficient cause for adjourning the session of the board. Ib. sec. 13.

501. Record of proceedings; attorney-general decides when board equally divided.—The board shall keep a record of its proceedings, which shall show what members were present at its meetings; and, when the members are equally divided upon any question, the attorney-general shall decide such question; and in every case in which he dissents from the conclusion of the majority of the board, he shall spread upon the records his reasons for such dissent. Ib. sec. 13.

502. Principles of valuation of railroad property.—The valuation of the property of railroad companies for taxation shall be made upon the same principles as the valuation of every other species of property, that is to say: The valuation of such property shall be had exclusively upon the consideration of what a clear fee-simple title thereto would sell for under the conditions under which that character of property is most usually sold. Ib. sec. 13.

503. Notice to assessors, and copy to superintendent of companies; duty of assessors.—When the board shall have completed the assessment of the property of any railroad company, the auditor shall notify the tax-assessor of each county, through which such railroad runs, of the number of miles of track in his county, and the value thereof, and the proportionate value of the other property of such company assessed by the state board of assessment, and taxable in his county, which he must enter in the book of assessments, in addition to the assessment of other real estate, fixtures, machinery, tools and other property of such company, to be assessed as other property of like kind owned by private citizens of his county; and the auditor shall also send to the superintendent of each railroad company, so assessed by such board, a copy of his notification to the tax-assessors touching the assessment against such company. Ib. sec. 14.

504. Returns to be made by telegraph companies.—The president, secretary, auditor, or managing agent in this state of Ib. sec. 15.

every telegraph company whose line, or any part thereof, is within the state, must annually, on or before the first day of April of each year, make, under oath, to the auditor, a return of the number of miles of telegraph wire in the state belonging to such company, and the value thereof, and the number of poles, batteries, instruments and articles of all kinds in the state, connected with its business, and the value thereof, specifying the several counties in which such property is situated, and the value of the property situated in each of such counties, and also the gross receipts of such company from its business done in the state during the preceding year; and if any of such companies, its officers, or agents fail to make such return within the time specified, the auditor must ascertain such items of property, values and receipts from the best information he can obtain.

Ib. sec. 15. **505. Report of auditor to state board; assessment, and proceedings thereon.**—The auditor must lay before the state board of assessment, at its next meeting thereafter, such returns, and when not made by any company, he must report to the board the items of property, values and receipts of the company failing to make returns, as ascertained by him; and thereupon the board must proceed to examine such returns and reports, determine the valuation of such property and the amount of such receipts, and assess the same for taxation, as in the case of assessment of the property of railroad companies; and it may add to the assessment against any telegraph company, failing to make returns within the required time, a penalty of not exceeding fifty per cent. thereon. Upon the completion of the assessment against any telegraph company by the board, the auditor shall give to the tax-assessors of the several counties in which such property is situated, and to the superintendent or managing agent of such company in this state, the same notification touching such assessment as is required of him in case of assessments against railroad companies; and thereupon such assessors must act in reference to such assessment, and to the assessment of any other property of such company taxable in their counties, as they are directed to act in case of assessments against railroad companies by the state board of assessment.

Ib. sec. 16. **506. Assessment of gross receipts of sleeping-car and express companies.**—The president, secretary, auditor, or accounting officer of any company, association, or corporation, engaged in the business of running sleeping-cars, or in the business usually carried on by express companies, in this state, which has no valid contract with the state for the payment of taxes, shall annually, during the month of April, make under oath to the auditor a return of the amount of its gross receipts from its business in the state during the preceding year; and on failure to make such return within the time specified, the auditor must ascertain such receipts from the best information he can obtain.

507. Report to, and assessment by state board; proceedings thereon.—The auditor must lay before the state board of assessment, at its next meeting thereafter, such returns, and when not made by any such company, association, or corporation, he must report to the board the receipts of the same as

ascertained by him; and thereupon the board must proceed to examine such returns and reports, determine the amount of such receipts, and assess the same for taxation, as in case of assessment of the property of railroad companies; and it may add to the assessment against any company, association, or corporation, failing to make returns within the required time, a penalty of not exceeding fifty per cent. thereon. Upon the completion by the board of any such assessment, they shall certify the same and the penalty, if any, to the auditor, who shall certify to the treasurer the amount of the taxes assessed against such company, association, or corporation. If, within thirty days after such assessment is certified to the auditor, the taxes assessed are not paid to the treasurer, the auditor must issue a warrant, directed to the tax-collector of any one or more of the counties in which such business is or has been carried on, commanding him to levy upon and sell the personal property of such company, association, or corporation, for the payment of such taxes and of the costs of the levy and sale; such sale to be made as other sales of personal property of delinquent tax-payers are made; and for the collection of such taxes, and for such levy and sale, the collector shall be entitled to the commissions and fees to which he is entitled for the collection of other taxes, and levy and sale of other personal property for the payment of taxes; and upon collecting such taxes, he shall forthwith account with the auditor therefor, and pay the same to the state treasurer, less his commissions thereon.

508. Assessment of property and receipts of telephone companies.—The president, secretary, or manager of every telephone company, owning or operating lines, must annually, on or before the first day of May, make under oath to the assessor of the county in which such instruments are located, or such lines are operated, a return of the property and receipts required by this article to be made by the officers or agents of telegraph companies to the auditor; and in case such return is not made by any company within the required time, the assessor must ascertain, from the best information he can obtain, the amount and value of such property, and the amount of such receipts; and on the property and receipts so returned or ascertained, the assessor shall assess the taxes against such company; and when there has been a failure on the part of any company to make a return of such property and receipts within the required time, the assessor shall add to the assessment against such company a penalty of fifty per cent. on the amount thereof. Such assessment, as well as the assessment of the other taxable property of such company in the county, must be entered by the assessor in the book of assessments. Ib. sec. 17.

509. Assessment of other property of railroad, etc., companies.—All property, real or personal, belonging to railroad, telegraph, sleeping-car and express companies, which is not required by the provisions of this article to be returned to the auditor, must be returned to the tax-assessor of the county in which it is taxable, and by him assessed, as other property in the county is returned and assessed. Ib. sec. 18.

ARTICLE IV.

POWERS AND DUTIES OF COURT OF COUNTY COMMISSIONERS, AND DUTIES OF JUDGE OF PROBATE TOUCHING ASSESSMENTS; LEVY OF COUNTY TAXES.

Ib. sec. 38.

510. Terms of commissioners' court.—For the performance of their duties under this title, the court of county commissioners, or other court having like jurisdiction, in each county, shall hold regular terms on the second Mondays in May, July and August of each year, and such adjourned and special terms as may be necessary; and such terms, regular, adjourned and special, may continue until the business of the court has been completed.

Ib. secs. 40, 42.

511. Duties of the court at the July term.—The judge of probate, at the term of such court commencing on the second Monday in July, shall deliver to the court the book of assessments, the poll-tax book and all lists of assessments, as received by him from the assessor; and the court shall then proceed to examine the same, and if they are prepared according to law, the court shall accept them; but the court must refuse to accept any assessment list not returned in the manner prescribed by this chapter, unless it shall satisfactorily appear that the prolonged absence, or the non-residence of the tax-payer was the cause thereof; and all assessment lists accepted by the court must be alphabetically arranged under its direction, and be carefully preserved for reference for three years, when they may be destroyed. The court must also order notice to be given for fifteen days, by advertisement in some newspaper published in the county, or if there be none, by posting the same at the court-house door and two other public places in the county, that the book of assessments has been prepared and is ready for inspection, and that the court will sit on the second Monday in August thereafter to examine the assessor's returns, and to correct any errors therein; and it shall be the duty of the judge of probate to see that such notice is given.

Ib. sec. 41.

512. Correction of errors in assessments.—At the term commencing on the second Monday in August, such court shall hear objections made to assessments, and shall determine the same upon the evidence adduced, instanter, unless a longer time is agreed on between the court and the tax-payer making the objection. The court shall cause a docket to be kept, in which shall be entered the name of the tax-payer making the objection, a succinct statement of the grounds of objection, and the decision of the court thereon, which must be signed by the presiding officer of the court. If, in the course of its examination, the court is of the opinion that any assessment contains an under-valuation of any property or subject of taxation, it shall raise the same to the proper amount; but before such assessment is raised, the person to whom such property or subject is assessed, if within the county, or has an agent therein, who returned the list, or is known to the court, or to the assessor, shall have had at least five days' notice in writing, to be served by the assessor or his deputy on him or his agent, of the time when it is proposed to consider such change; and the court may adjourn to a day certain, in order that the required notice may be given. Nothing herein contained shall, however, prevent the court from correcting any errors in assessments

which may be discovered subsequently to its August term; but no change shall be made in any assessment for a preceding year, or when the taxes have been collected.

Perry County v. Railroad Co., 65 Ala. 392.

513. Duty of assessor to attend court.—The tax-assessor shall attend the terms of such court held in July and August, or any adjourned or special termthereof, while the court is engaged in examining, hearing and correcting assessments. Ib. sec. 41.

514. Assessments of escaped taxes reported to court; how entered, collected and paid over.—Every assessment of escaped taxes against any person or property, made by the assessor, shall be by him reported in writing to the court of county commissioners, who, upon five days' written notice to the person against whom the assessment is made, if known, is in the county, or has an agent therein who is known to the assessor, or to the court, to be served on him or his agent by the assessor, or his deputy, shall, at any regular, adjourned, or special term, proceed to allow, modify, or reject the assessment, as the justice of the case, upon the evidence adduced, may require. If the assessment is allowed as made, or is modified and allowed, it shall be entered in the book of assessments, collected and paid over as other assessments for the year in which it was made; but the rate of taxation thereon, both for state and county purposes, shall be governed by the rate for the year or years the subject of the assessment escaped taxation. Ib. sec. 43.

515. Intent and purpose of foregoing provisions; same liberally construed.—The intent and purpose of the foregoing sections of this article is to have all property and subjects of taxation fairly assessed, and the property at the value which would be realized by a sale thereof, made in such manner as such property is usually sold; and for this purpose, the power and authority conferred in this article upon the court of county commissioners shall be liberally construed. Ib. sec. 44.

516. When collector notified of changes in assessment. It shall be the duty of the court of county commissioners, if any errors are corrected, or any abatements or deductions in assessments are made at any time after the collector's book has been by the judge of probate turned over to the tax-collector, forthwith to notify such collector of the same. Ib. sec. 46.

517. Court may require assessor and collector to produce books and papers.—The court of county commissioners shall have power to compel, at any time, the production before it of all such books and papers as by law are required to be made or kept by the tax-assessor and tax-collector, relating to the revenue of the state or county. Ib sec. 47.

518. Levy of county tax.—It shall be the duty of the court of county commissioners, at the term commencing on the second Monday in August, to levy the amount of taxes required for the expenses of the county for the current year, not to exceed one-half of one per cent. on the value of the taxable property, and the amount of other subjects of taxation in the county, as assessed for revenue to the state, as shown by the book of assessments after it has been corrected. Ib. sec. 48.

519. Duty of commissioners to provide a plat for the county. It shall be the duty of the court of county commissioners to Ib. sec. 49.

provide a plat of the county, unless such plat has already been provided, showing by section, township and range all the land in the county, the nature thereof, whether agricultural, mineral, grazing, or timber, and all lots in cities or towns by their usual numbers or description. The sections shall be numbered with the numbers given in the United States surveys, and such sections, or parts of sections, as belong to the United States, or to any corporation by grant from the United States, shall be designated; but, as the same, from time to time, become private property by purchase or otherwise, the fact shall be noted on such plat. Such plat shall also show the several sections, or parts of sections, occupied by any railroad company as right of way.

Ib. sec. 45.

520. Certificate on book of assessments after it is corrected and completed.—After the adjournment of the August term of the court of county commissioners, and after the county taxes have been levied, and the assessor has corrected the book of assessments in accordance with the decisions of such court, and after the assessor has extended opposite the name of each tax-payer the amounts of the state and county taxes, and other tax, if any, with which such tax-payer is chargeable, and has footed, at the bottom of each page, the aggregate amount of each of such taxes, carried his footings from page to page, and shown, in conclusion, the aggregate of each of such taxes, the presiding officer of such court shall certify on the book of assessments that the same has been examined, corrected and allowed by such court; and that the amount of state tax is $——, the amount of county tax is $——, the amount of special tax is $——, and the total amount of the poll-tax is $——, specifying the total amount of each of such taxes; and such certificate shall be the warrant to the tax-collector of the county to proceed to collect such taxes in the manner directed by law; if the poll-tax, or any part thereof, has been assessed in a separate book from the property tax, the presiding officer shall certify on such poll-tax book the amount of the poll-tax therein assessed, and such certificate shall be the warrant to the tax-collector to collect such poll-taxes.

Ib. sec. 50.

521. Judge of probate to furnish abstract book to collector.—After the book of assessments has been completed, as above provided, the judge of probate must enter in a book, in a concise form, the amount of taxes assessed against each tax-payer, showing separately the amount of taxes on real estate and personal property, and other subjects of taxation, and the fees of the assessor and collector; and such book he must turn over to the tax-collector on or before the day on which the taxes become due and payable; and for the services rendered by him in the preparation of such book, he shall receive such compensation as the court of county commissioners may allow him, not exceeding one hundred dollars.

Britton v. State, 77 Ala. 202.

Ib. sec. 51.

522. Abstract of assessment for auditor and collector. It shall be the duty of the judge of probate to make out in duplicate, upon blank forms to be furnished by the auditor, a complete abstract of all real and personal property in his county, as contained in the book of assessments, showing the total amount and value of each class of taxable property, the amount of each

class of other subjects of taxation, and the amount of tax on each item, extended in a column, and the property exempt from taxation, and the total amount of such sums extended; one of which he shall forward to the auditor within ten days after the adjournment of the August term of the court of county commissioners, and the other he must file in the office of the tax-collector.

523. Abstract of poll-tax for superintendent of education and collector.—The judge of probate must also make out in duplicate, on blank forms to be furnished by the superintendent of education, a correct statement of the number of polls assessed in his county, as contained in the poll-tax book, and of the aggregate amount of such taxes; one of which he shall forward to the superintendent of education within ten days after the adjournment of such August term, and the other he shall file in the office of the tax-collector. March 1, 1881, p. 8, sec. 2.

524. List of insurance agents furnished assessor.—The judge of probate must, on or before the 10th day of March of each year, furnish the tax-assessor with a list of all agents for insurance companies in his county, with the names of the companies represented by them, so far as the same are disclosed by any records or books in his office. Feb. 17, 1885, p. 21, sec. 52.

CHAPTER 5.

COLLECTION OF TAXES.

ARTICLE 1.—Tax-collector; election, bond, oath of office and compensation; deputies.

2.—Duties of tax-payers and powers of tax-collectors and other officers in collection of taxes; reports and settlements by tax-collectors.

3.—Sales of lands for payment of taxes.

ARTICLE I.

TAX-COLLECTOR; ELECTION, BOND, OATH OF OFFICE AND COMPENSATION; DEPUTIES.

525. Tax-collector; election and term of office.—There shall be elected, at the time, in the manner, and for the term provided by law, a tax-collector for each county in the state, who shall perform such duties as are, or may be prescribed by law. Feb. 17, 1885, p. 21, sec. 54.

526. Official bond.—Before entering upon the discharge of the duties of his office, the tax-collector must execute a bond in duplicate, in double the probable amount of the taxes that may at any one time be in his hands, to be determined for each county by the auditor, payable to the State of Alabama, with at least two sufficient sureties, to be approved by the judge of probate of his county, and conditioned faithfully to discharge the duties of his office, which are, or may be required by law during the time he continues therein, or discharges any of the duties thereof. One of such duplicates shall be filed and recorded in the office of the judge of probate, and the other shall be filed in the office of the auditor. Ib. sec. 55.

State v. Lott, 69 Ala. 147; State v. Houston, 78 Ala. 576.

Ib. sec. 55.

527. Lien of bond.—Such bond shall operate, from the date of its execution, a lien in favor of the state and county, on the property of the tax-collector, and from the date of his default, on the property of the sureties thereon, for the amount of any judgment that may be rendered against such tax-collector for the breach of any official duty; and any new or additional bond, given in pursuance of law by the tax-collector, shall operate a like lien.

County v. Timberlake, 54 Ala. 403; Knighton v. Curry, 62 Ala. 404.

Ib. sec. 56.

528. Oath of office.—He shall also, before entering upon the discharge of the duties of his office, file in the office of the judge of probate of his county, an oath in writing, that he will faithfully and diligently discharge all the duties which are, or may be imposed upon him by law; and such oath must also be recorded.

Ib. sec. 70.

529. Commissions.—He shall be entitled to commissions upon the amount of the state taxes collected by him, as follows: In counties in which the collections do not exceed twelve thousand dollars, at the rate of eight per cent. on the first thousand dollars, four per cent. on the next thousand dollars, and two per cent on the remainder; and in counties in which the collections exceed twelve thousand dollars, his commissions shall be the same as above provided up to twelve thousand dollars, and one and one-half per cent. up to sixty thousand dollars, and one-half of one per cent. on the remainder. He shall also be entitled to the same rates of commission upon the county taxes collected by him, and a commission of five per cent. upon the amount of poll-taxes collected by him; and upon the amount of escaped taxes collected by him he shall be entitled, in addition to his regular commissions for collecting the same, to one-half of the commissions thereon allowed the assessor for assessing the same, so as to divide the assessor's commissions thereon equally between them. The collector may retain his commissions upon collections when he makes payments into the state treasury.

Shaver v. Robinson, 59 Ala. 195.

Ib. sec. 71.

530. Mileage to and from seat of government.—He shall be entitled to retain out of the state taxes collected by him mileage, at the rate of ten cents per mile in going to, and returning from the seat of government, once in each year, for the purpose of making his settlement and paying over the taxes collected by him, on the basis of distances established by law for members of the general assembly.

Ib. secs. 72, 60.

531. Fees to collector.—For making the demand on delinquent tax-payers, hereinafter in this chapter required of him, the collector shall be entitled to a fee of fifty cents from each tax-payer on whom such demand was made, which shall be charged against such tax-payer and collected for the use of the collector, in the same manner, and by the same means, as taxes are collected; but he shall only charge one fee against each tax-payer for making such demand, although such tax-payer may be assessed a poll-tax and also a tax on property; and he shall be entitled to such other fees as may be expressly allowed to him by law. But the collector for Jefferson county shall receive the same fees as are allowed by special act to the collectors for Mont-

gomery and Dallas counties, if such collector complies with the provisions of such special act.

532. Authority to appoint, and liability for acts of deputies.—The tax-collector is authorized to appoint deputies, and the acts of such deputies shall be recognized as his acts, and he shall be responsible for any loss sustained by any tax-payer, or by the state or county, by reason of acts done by such deputies in the line of their powers and duties. Such deputies shall receive no compensation for their services out of the state or county revenues.

ARTICLE II.

DUTIES OF TAX-PAYERS; DUTIES AND POWERS OF TAX-COLLECTOR, AND OTHER OFFICERS IN COLLECTION OF TAXES; REPORTS AND SETTLEMENTS BY TAX-COLLECTOR.

533. Appointments by collector, and notice thereof.—The tax-collector shall attend, at the voting place in each election precinct in the county, twice in each year, at least thirty days apart, from eight o'clock in the morning until four o'clock in the afternoon, for the purpose of collecting the taxes of such precinct; and of the time and purpose of such appointments, he shall give at least thirty days' notice by publication in some newspaper, if one is published in the county, and by bills posted at five or more public places in each election precinct. At such appointments the collector shall receive from each tax-payer of the precinct, meeting him thereat and tendering the same, the taxes and fees assessed and charged against him. Ib. secs. 57, 58.

534. Effect of collector's failure to attend appointments; new appointments.—If the collector fails to fill either of such appointments in any precinct, he shall make, and, after like notice, fill a new appointment; and failing to do so, he shall forfeit the fee allowed him for making demand on any tax-payer in such precinct who may become delinquent, for the taxes due by him, and who attended and was disappointed by the non-attendance of the collector at such original appointment. Ib. sec. 59.

535. Attendance at court-house; time in which appointments must be completed.—The collector must be present at the court-house of his county for ten days preceding the first day of January of each year, except in the counties of Dallas, Jefferson, Mobile and Montgomery, in which he shall attend at his office during the month of January, from eight o'clock in the morning until four o'clock in the afternoon, for the purpose of receiving taxes; and his appointments in the county must be completed in time to allow him to comply with the provisions of this section. Ib. sec. 60.

536. Demand upon delinquent tax-payers.—After the collector has completed his appointments, he must make a personal demand, in writing, upon delinquent tax-payers, or their agents charged with the duty of paying their taxes, wherever they may be found, for the amount of their taxes and fees; and when unable to find them, he shall leave such demand at their places of business or residence; and it shall be the duty of such delinquents forthwith to pay the taxes and fees assessed and charged against them. Ib. sec. 61.

Ib, sec. 10.

537. Payment of taxes.—It shall be the duty of the tax-payers in each precinct to meet the tax-collector at one of his appointments therein, and then pay to him their taxes; but if from any cause such payment is not made at either of such appointments, it may be made at any time before the taxes become delinquent, without incurring any penalty for failing to then make such payment; but if the taxes are paid after they have become delinquent, the tax-payer shall also pay all costs, fees and charges, if any, that may at the time of payment have lawfully accrued.

Ib. sec. 58.

538. Receipt of collector to tax-payer.—Upon the payment of taxes, and of fees and costs, if any, assessed and charged against him, by any tax-payer, the collector shall give him a receipt therefor, in the form of an account, showing the different items of property and other subjects assessed against him, and the values or amounts thereof, the amount of the tax on each of such items, the fees charged and costs incurred, if any, and the total amount of such taxes, fees and costs; and such receipt shall be prima facie evidence that such tax-payer has paid all his state and county taxes, for that year, on the real and personal property, and other subjects of taxation, contained in his assessment list, and all fees and costs mentioned in such receipt.

Ib. sec. 58.

539. Stub-book of receipts kept by collector; delivery and production compelled by commissioners.—The collector shall keep a stub-book, or books, of receipts for each tax-year, from which all receipts given to tax-payers must be taken; and upon payment by any tax-payer, the collector shall enter on the stub from which the receipt is taken the name of such tax-payer, the amount of his taxes, stating the amount of taxes on real estate, and the amount of taxes on personal property and other subjects of taxation separately, the fees and costs charged against him, and the aggregate of all taxes, fees and costs collected from him, and the date of collection; and such stub and the receipt taken therefrom shall correspond. Such book or books, at the end of the tax year, shall be delivered by the collector to the judge of probate, and the production thereof by the collector may be compelled by the court of county commissioners, at any time before the delivery thereof to the judge of probate.

Britton v. State, 77 Ala. 202.

Ib. sec. 62.

540. Sale of personal property; no redemption allowed; payment before sale.—After the first day of January of each year, the tax-collector must proceed, without delay, to levy upon any personal property of delinquent tax-payers for the payment of their taxes, and, after having first given ten days' notice of the time and place of sale, with a description of the property to be sold, by posting the same at three or more public places in the precinct of the residence of such delinquent, either at the time of assessment or of the levy, or, if he is a non-resident of the county, in the precinct in which the levy was made, he must sell the same, or so much thereof as may be necessary to satisfy the taxes, fees and expenses of sale, including expenses of keeping the property and moving the same to place of sale, in front of the court-house of the county, or at the voting place, or, in case the amount of the taxes does not exceed five

dollars, at any other place in the precinct in which such notice was posted, at public outcry to the highest bidder for cash; and the property so sold shall not be subject to redemption. For making such sale the collector shall be allowed a fee of one dollar, to be collected out of the property. But such tax-payer may, at any time before the sale, pay the taxes, fees and expenses, including the collector's fee for the sale, the same as if it had been made, and thereby discharge the levy.

Rodgers v. Gaines, 73 Ala. 218.

541. Application of proceeds of sale; other levies and sales authorized.—The proceeds arising from such sale shall be applied to the payment of the expenses of the sale, and of the taxes and fees due from such tax-payer, and any balance remaining shall be paid to the owner of the property, if present at the sale; if not present, or if present and he refuses to receive the same, the collector shall deposit such balance with the county treasurer, or, if there is no county treasurer, with the judge of probate, taking a receipt therefor, and the same shall be kept as a special fund; and whenever such owner shall apply to the collector for such balance, the collector shall deliver to him the receipt therefor, and upon presentation thereof by such owner, the officer with whom such deposit was made, shall pay to him the amount expressed in the receipt. If the proceeds of sale are insufficient to satisfy the taxes, fees and charges, other levies and sales may, in like manner, be made. Ib. sec. 62.

542. No property exempt from sale.—No property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes and the fees and charges lawfully incurred in assessing and collecting the same. Ib. sec. 62.

543. Collection by garnishment; collector to ascertain persons indebted to tax-payer.—If the collector ascertains, or has just cause to believe that any person is indebted to, or has in his possession, or under his control, any money, property, or choses in action, belonging to any delinquent tax-payer in his county, he shall forthwith serve upon such person a notice in writing to appear before some court of the county having jurisdiction of the amount involved, naming the court, to answer as garnishee, and under oath, whether he was indebted to such tax-payer at the time of the service of the notice, or at the time of making his answer, or whether he will be indebted to him by any contract then existing, and if so, the amount of such indebtedness; and whether he has in his possession, or under his control, any and what money, property, or choses in action belonging to such tax-payer; and in such notice he shall state the amount of the taxes and fees due from such tax-payer. He shall also forthwith give such tax-payer, if in the county, written notice of the service of such garnishment; and the garnishment and notice he shall without delay return executed to the court before which the garnishee is cited to appear. And it shall be the duty of the collector, as far as by diligent inquiry he can, to ascertain what persons are indebted to, or have in their possession any money, property, or choses in action belonging to any delinquent tax-payer. Ib. sec. 64.

State v. McAllister, 60 Ala. 105.

Ib. sec. 64.

544. Proceedings on garnishment.—Such proceedings shall be conducted in the name of the state; and if the notice served on the garnishee is returnable before a justice of the peace, the garnishee must answer within three days after service; if before the circuit court, or court having like jurisdiction, he must answer within the first three days of the term next thereafter, if service was made upon him ten days before the commencement of the term; but if not, at the second term next thereafter; and thereupon, or in the event of a failure to answer, such proceedings and judgment may be had as in cases of garnishments on judgments.

Ib. sec. 64.

545. Costs in such proceedings.—If the garnishment is returnable before a justice of the peace, the collector shall be entitled to one dollar, and the justice to two dollars, for their services in each case; if before the circuit court, or court having like jurisdiction, the clerk and sheriff shall be entitled to the same fees as in cases of garnishments on judgments, and the collector to two dollars.

Ib. sec. 63.

546. When real estate may be sold for taxes.—When no personal property can be found out of which the taxes of any delinquent tax-payer can be collected, or an amount insufficient to fully satisfy such taxes, the real estate of such tax-payer, or the real estate upon which such taxes are a lien, may be sold for the payment thereof, or of the balance due thereon, in the manner hereinafter in this title prescribed.

Ib. sec. 65.

547. List of errors and insolvents reported to commissioners.—The tax-collector must, in each year, report on oath to the court of county commissioners, at the term thereof commencing on the second Monday in May, a list of the persons from whom the taxes assessed against them cannot be collected, with the amount of the taxes, state and county, assessed against each, which shall be termed "list of insolvents," and a list of such persons as have been over-assessed, or otherwise wrongfully assessed, with the taxes, state and county, assessed against each, which shall be termed "list of errors in assessment."

Perry County v. Railroad Co., 58 Ala. 547; State v. McBride, 76 Ala. 52.

Ib. secs. 39, 65.

548. Duty of commissioners as to such lists; credits allowed collector.—At the same term, such court shall make a careful and rigid examination of such lists, and of the facts pertaining thereto, and shall ascertain and determine what taxes contained in the list of insolvents the collector could not, by the use of due diligence, have collected, and what taxes contained in the list of errors in assessment should not have been collected by him, by reason of such errors, and shall correct such lists accordingly, and shall credit the collector with the county taxes contained in such lists as corrected; and the presiding officer of the court shall, within ten days after its adjournment, separately certify to the auditor the amount of state taxes contained in each of such lists as corrected, and with the amounts thus certified the auditor shall credit the collector on the final settlement of his account with the state for such year; and the collector is prohibited from thereafter collecting any taxes appearing on the list of insolvents as corrected by the court.

549. Collection of taxes against insolvents by justices of the peace, etc.—Within twenty days after the adjournment of such court, the judge of probate shall cause to be made from the list of insolvents, as corrected by the court, a separate list for each precinct of such insolvents as reside therein, which he must, within ten days, or as soon thereafter as practicable, cause to be delivered to a justice of the peace, or a notary public exercising the jurisdiction of a justice of the peace, of such precinct, or if in such precinct there is no justice or such notary, then to some suitable person in that or an adjoining precinct, for collection, and take a receipt therefor; and such officer or person shall collect, if by due diligence he can, the taxes specified in such list, and for that purpose he is clothed with all the powers of the tax-collector; and he shall be entitled for his services to twenty-five per cent. of the amount collected by him, to be borne ratably by the different funds to which such taxes belong, according to the interest of each therein, in addition to the collector's fee; and he shall make return on oath to the judge of probate, on or before the twenty-fifth day of December next thereafter, of such list of insolvents, and of the amounts collected by him, specifying the tax-payers from whom such collections were made, and of the reasons for not collecting any taxes that may remain uncollected, and shall pay to the judge of probate all the taxes collected by him, less his commissions; and the judge of probate shall forthwith pay over the amounts received by him from the several precincts to the officers entitled to receive the same. Every notary public and justice of the peace, entrusted with such collections, and his sureties shall be liable on his official bond for money collected under the provisions of this section, which he failed to pay over to the judge of probate, upon suit therefor in the name of the state; and the judge of probate may direct the institution of such suit. Ib. secs. 39, 131

550. Collection of taxes from tax-payer about to remove from county.—It shall be the duty of the tax-collector, whenever, upon information or otherwise, he has good reason to believe that any person owing taxes, whether due or not, is about to leave or remove his property from the county, and thereby the collection of such taxes is endangered, to make out and certify to the judge of probate a bill against such person for the amount of such taxes and any fees due the assessor or collector; and upon the approval thereof by the judge of probate, in writing, indorsed thereon, such bill shall operate as a writ of fieri facias, which the collector is authorized to execute by levy and sale in the same manner as sheriffs are authorized to execute such writs when issued out of the circuit court. Ib. sec. 66.

551. Liability of collector when notified of person about to leave county.—On the failure of the collector to act when notified by the assessor that any person assessed is about to leave the county, he shall be liable for the amount of the taxes assessed against such person. Ib. sec. 67.

552. Collector to notify assessor of escaped taxes.—If the tax-collector, while engaged in the collection of taxes for any year, discovers that any person or property has escaped taxation for that or any other year within five years next preceding, he must at once notify the tax-assessor in writing of such person Ib. sec. 69.

or property, and the assessor shall thereupon be charged with the duty of seeing that the proper assessment is made against such person or property.

Lehman, Durr & Co. v. Robinson, 59 Ala. 219; Oliver v. Robinson, 58 Ala. 46; Perry County v. Railroad Co., 65 Ala. 392.

Ib. sec. 68.

553. Separate account of poll-tax paid by each race kept. The tax-collector shall keep a separate account of the amount of the poll-tax paid by persons of each race in each township, and shall furnish a statement of the same to the county superintendent of education at the time he pays the same to him.

Feb. 7, 1879, p. 117, sec. 15.

554. Monthly payments of poll-tax.—The tax-collector shall, at the end of each month, pay to the county superintendent of education the amount of the poll-tax collected during the month, taking his receipt therefor in duplicate, one of which he shall forthwith forward to the superintendent of education.

Feb. 17, 1885, p. 21, sec. 73.

555. Monthly reports and payments to be made by collector.—The tax-collector, on the first day of November in each year, and on the first day of each month thereafter until he makes his final settlement for such year, shall make under oath to the county treasurer, or to the judge of probate, if there be no county treasurer in the county, an itemized report in writing, setting forth separately the taxes collected by him for the state and county during the preceding month; and within five days after making such report he must pay over to the state treasurer and county treasurer the amounts due the state and county, respectively, on account of his collections during such month.

Ib. sec. 74.

556. Monthly report by county treasurer or judge of probate.—The officer receiving such report must, within three days thereafter, report in writing to the auditor and state treasurer the amount of state taxes collected by the collector during such month, as shown by his report; and if the collector fails to make his report within the time required by law, such officer must likewise report that fact to the auditor and treasurer; and the state treasurer must promptly report in writing to the governor any failure on the part of the tax-collector to comply with the provisions of the preceding section.

Ib. sec. 75.

557. Accountings with auditor in January and April. The collector must also account under oath to the auditor, in the month of January in each year, and on or before the tenth day thereof, for all state taxes collected by him for the current year prior to the first day of that month, and in the month of April, and on or before the tenth day thereof, for all state taxes collected by him for the current year between the first day of the preceding January and the first day of April; and upon such accounting, he shall be allowed by the auditor the amount then due him for commissions, and all fees and all expenses incurred by him in the discharge of the duties of his office, chargeable against the state.

Ib. sec. 76.

558. Final settlements by collector.—On or before the first day of July in each year, the tax-collector must make with the auditor a final settlement of his accounts with the state, and pay over to the state treasurer any balance that may be found against him on such settlement; and on or before the same day in each year he shall make with the county treasurer, or if there be no county treasurer in his county, with the officer charged with

the duties of county treasurer, a final settlement of his accounts with the county, and pay over to such treasurer or officer any balance that may be found against him on such settlement. Both of such settlements must be made by the collector under oath, which may be administered by the officer with whom the settlement is made; and thereon he shall account for all moneys received by him for the state and county, respectively, from every source, not previously accounted for, and shall be charged with all items with which he is legally chargeable, and shall receive all credits which by law he is entitled to receive.

Shaver v. Robinson, 59 Ala. 195; Kilpatrick v. Pickens County, 66 Ala. 422; State v. Lott, 69 Ala. 147; State v. McBride, 76 Ala. 52.

559. Final settlement of poll-tax.—On or before the first day of July in each year, the tax-collector must make with the superintendent of education under oath, a final settlement of the poll-tax, charging himself with the amount assessed, as shown by the statement of the judge of probate, and crediting himself with the amounts paid to the county superintendent of education, with the amounts allowed on the lists of "insolvents" and of "errors in assessment," and the commissions fixed by law for the assessment and collection of the poll-tax, and with such other amounts, if any, as he is entitled to by law; and any balance that may be found against him on such settlement he must pay over to the county superintendent of education, taking his receipt in duplicate therefor, one of which he must forthwith forward to the superintendent of education. March 1, 1881, p. 8, sec. 2.

560. Grounds of suspension by governor; appointment of commissioner during suspension.—If any tax-collector, without good and sufficient excuse, to be decided by the governor, fails to comply with any of the requirements of the last three sections, or of sections 554 and 555, he shall be suspended by the governor from the further performance of the duties of his office, and shall remain suspended, unless the general assembly, by joint resolution, restore him to office; and on such suspension the governor shall appoint a tax commissioner, who shall continue in office during such suspension, and who, after giving the bond and taking the oath of office required of tax-collectors, shall collect the taxes of the county, and perform all the other duties pertaining to the office of tax-collector, and shall be subject to the same rules, requirements, responsibilities, penalties and liabilities as are made for, or imposed upon tax-collectors. On such suspension and qualification of such commissioner, the tax-collector shall deliver to him the books and papers of his office, and shall forthwith make settlements with, and pay over to the proper officers the public moneys in his hands. Feb. 17, 1885, p. 21, sec. 77.

561. Settlement by personal representative on death of collector.—On the death of any tax-collector, his personal representative, general or special, must, out of the first moneys that come into his hands belonging to the estate of his decedent, and as soon as the same come into his hands, pay to the proper state and county officers the amount of public funds collected by such decedent, and not paid over by him at the time of his death, and must make settlement with such officers of any unsettled accounts of such decedent with the state and Ib. sec. 78.

county touching the affairs of his office, as soon as practicable, and not later than the time when tax-collectors are required to make final settlements.

Ib. sec. 79.

562. What receipts for special taxes must specify.—Whenever any tax-collector collects any special taxes, he shall specify in the receipts given to tax-payers the amount of such taxes, and the purpose for which they were levied and collected.

Ib. sec. 80.

563. Special taxes; how kept and paid over.—Such special taxes, when collected, must be kept by the tax-collector separate from all other public moneys in his hands, and must be paid over by him to the county treasurer as a distinct fund.

Ib. sec. 81.

564. How special taxes kept and disbursed by treasurer. The county treasurer receiving such special taxes shall keep the same separate and distinct from all other public funds, and shall keep a separate account thereof, and shall promptly disburse the same upon orders drawn thereon by the legally authorized authority.

Ib. sec. 82.

565. How account of special taxes closed by treasurer. When the object for which such special taxes were levied and collected shall have been accomplished, or, for any other reason, the same are no longer required for the purpose for which they were levied, the parties charged with the administration or application thereof shall notify the treasurer, who shall thereupon close the account of such taxes, and transfer any balance remaining to the account of the general fund of the county.

ARTICLE III.

SALES OF LANDS FOR PAYMENT OF TAXES.

Ib. sec. 83.

566. Jurisdiction of probate court to order sale of land for taxes.—The probate court of each county is empowered to order the sales of lands therein for the payment of taxes assessed on such lands, or against the owners thereof, when the tax-collector shall report to the court that he was unable to find sufficient personal property therefor.

Ib. sec. 84.

567. Docket of lands made by collector; oath thereto. It shall be the duty of the tax-collector, at the expense of the county, to procure a substantially bound book, in which he shall enter, in the manner usual in docketing causes for trial in the circuit court, each parcel of real estate assessed to any person against whom taxes have been assessed which are not paid, when a portion or all of such taxes are on such real estate, describing the same in the same manner as it is described in the assessment list, and stating the amount of the unpaid taxes, penalties, fees and charges due by such person, specifying the amount due the state, that due the county, and that due for fees and charges; and he shall, in like manner, enter in such book each parcel of real estate which has been assessed to an "owner unknown," and the amount of taxes, fees and charges due thereon, stating in each case the fact that it was so assessed. The descriptions of such real estate shall be entered in alphabetical order, by precincts of the residence of the owners, if known, and they reside in the county, but if they are unknown, or do

not reside in the county, then by the precincts in which the real estate is situate. In such book, and at the end of such entries, the tax-collector shall make and subscribe an oath, to be administered by the judge of probate, in substance as follows: "I do solemnly swear that I have, in each case entered in this book, made diligent search for personal property of the parties against whom the taxes are respectively assessed, and, after diligent search, I have been unable to find sufficient personal property out of which to collect the taxes, or any part thereof."

568. Preparation of docket; time of delivery; effect of failure to deliver.—Such book shall be prepared in a neat and orderly manner, in a fair and legible handwriting, with sufficient space in each case to make the necessary entries, and, in other particulars, in a manner suitable for the purposes for which it is to be used; and if it is not thus prepared, the judge of probate shall cause it to be so prepared, at the expense of the collector, and the cost thereof shall be deducted from his compensation. Such book shall be delivered to the judge of probate on or before the 1st day of March; but if, from any cause, there has been a failure to deliver the same by that time, it may be delivered thereafter. Ib. sec. 85.

Driggers v. Cassady, 71 Ala. 529.

569. Notices issued to persons assessed; form of.—On receiving such book, and as speedily as practicable, the judge of probate shall issue a notice addressed to each person against whom any unpaid taxes are assessed, as shown by such book, substantially in the following form: Ib. sec. 86.

"The State of Alabama, } To —— ———: The tax-collector
——————— county. } has filed in my office a list of delinquent tax-payers, and of real estate upon which taxes are due. You are reported as delinquent, and the following real estate is reported as assessed to you, to-wit: (Here insert description). This is to notify you to appear before the probate court of said county, at the next term thereof, commencing on Monday, the — day of ——, 18—, then and there to show cause, if any you have, why a decree for the sale of said real estate should not be made for the payment of the taxes assessed against you, and fees and costs. —— ———, Judge of Probate."

570. Service of notice; how made and returned.—Such notice must be served by the tax-collector, or his deputy, by handing a copy thereof to the party to whom it is addressed, or his agent, or by leaving a copy thereof at the residence or place of business of such party, or his agent; and, with his indorsement thereon, showing how and when served, or if not served, showing his reasons for not serving the same, it must be by the collector, or his deputy, returned into court on or before the first day of the next term thereof. If the party against whom such assessment was made has since died, and letters testamentary or of administration have been granted upon his estate, such notice must, in like manner, be served on his personal representative, if a resident of the county. If the property or other subjects embraced in any assessment were returned or listed by a guardian, or other person, for a minor, or person of unsound mind, or by a trustee for his cestui que trust, except husband for wife, or by a personal rep- Ib. sec. 87.

resentative for the estate of any deceased person, or by a public officer, receiver, or appointee of any court, such notice must, in like manner, be served on the party making the return, or his successor, and also by publication or posting, as provided in the next succeeding section; and the book, to be prepared and delivered to the judge of probate by the collector, must show, in each case, by whom such returns were made.

Ib. sec. 87.

571. Notice by publication or posting; when given.—If the person against whom such assessment was made is a non-resident of the county, and has no agent therein known to the tax-collector, or if he has died since making the return, such notice may be given by publication in a newspaper published in the county, or, if no newspaper is published therein, by posting the same at the court-house of the county for three weeks.

Ib. sec. 87.

572. Notice when lands assessed to "owner unknown;" form of, and how given.—When any assessment is made to an "owner unknown," notice must be given by publication in a newspaper published in the county, or, if no newspaper is published therein, by posting the same at the court-house of the county, for three weeks, substantially in the following form:

"The State of Alabama, } To whom it may concern: Take
——————— county. } notice that the tax-collector has filed in my office a list of delinquent tax-payers, and of real estate upon which taxes are due; and therein is reported as assessed to "owner unknown" the following real estate, to-wit: (Here insert descriptions.) This is to notify you to appear before the probate court of said county, at the next term thereof, commencing on Monday, the — day of ——, 18—, then and there to show cause, if any you have, why a decree for the sale of said real estate should not be made for the payment of the taxes assessed upon the same, fees and costs.

"—— ——— Judge of Probate."

In answer to such notice, any person, having an interest in, or claim to such real estate, may appear and defend against the proceedings seeking to condemn the same to sale for the payment of the taxes assessed thereon. When practicable, all real estate, so assessed for any one year, must be incorporated in one notice, a separate paragraph being given to the description of the real estate embraced in each assessment.

Ib. sec. 88.

573. Decree of sale.—If service of such notice is perfected ten days before the commencement of the term to which the same is returnable, the cause shall stand for trial at such term; and if no defense is interposed, or, if interposed, and on the trial thereof the same is adjudged insufficient in law, or is not sustained by the evidence adduced, the probate court shall make and enter on such book or docket a decree of sale, substantially in the following form:

"It appearing to the court that taxes have been assessed against the person mentioned in this cause (or, if the assessment is to an "owner unknown," that taxes have been assessed on the real estate mentioned in this cause), to the amount of ——— dollars for the year 18—, and that the same are still due and unpaid; and it further appearing that notice of this proceeding has been given as required by law, and no valid defense has been in-

terposed against the sale of said real estate for the payment of said taxes: It is, therefore, ordered, decreed and declared by the court, that the State of Alabama has a lien for the payment of said amount, and for the additional sum of ——— dollars for fees, charges and costs in this behalf lawfully incurred, on the following described real estate, to-wit: (Here insert description.) It is further ordered, adjudged and decreed by the court, that said real estate, or so much thereof as may be necessary, be sold for the payment of said delinquent taxes, and of said fees, charges and costs, and of the expenses of such sale."

Such decree, when entered, shall be signed by the judge of probate.

Driggers v. Cassady, 71 Ala. 529.

574. Trial term when service not made in time; issue of new notices; continuances.—If the service of notice is perfected before the commencement of the term to which it is returnable, but not in time for trial at such term, the cause shall stand for trial at the next succeeding term. If any notice is returned not served, other notices may be issued returnable to other terms of the court until service has been had; and if two notices to the same person are returned not served, notice by publication or posting may be given as in case of non-residence. For good and sufficient reason made known to the court, any cause may be continued from term to term. Ib. sec. 87.

575. Collector to attend court; his book as evidence.—It shall be the duty of the tax-collector to attend at the several terms of the probate court, at which any of such causes are triable, and to have with him his tax-book; and such book shall, in all cases, be accepted as prima facie evidence of the amount of taxes and fees due, and that the same have been properly assessed and charged, and are unpaid. Ib. sec. 89

576. Sales under decrees; notice of sale.—Immediately at the end of any term of court, at which any decrees for the sales of real estate for the payment of taxes are rendered, or as soon thereafter as practicable, the tax-collector shall proceed to enforce such decrees by sales of the real estate ordered to be sold; and to this end, he shall give notice for thirty days before the day of sale, by publication in some newspaper published in the county, once a week for three successive weeks, and, at least three weeks before the day of sale, shall post a notice at the court-house in his county, and at some public place in the precinct in which the real estate is situate, that at the time specified therein he will proceed to sell such real estate, separately describing such portions thereof as are embraced in each decree, and stating the amount for which each decree was rendered, and the person against whom the taxes embraced in such decree were assessed, or, if assessed to "owner unknown," stating that fact. The rate to be charged for publishing such notice in a newspaper shall not exceed one cent per word for each insertion; and if no newspaper is published in the county, or the publication of such notice cannot be had in the county at the above rate, the posting of the notice at the court-house and at a public place in the precinct in which the real estate is situate, as required by this section, shall be sufficient notice of such sale. Ib. sec. 0

Ib. secs. 90, 96.

577. Time and place of sale; judge of probate attends sales and makes record thereof.—Such sales shall be made in front of the door of the court-house of the county, at public outcry to the highest bidder for cash, between the hours of ten in the morning and four in the afternoon, and shall continue from day to day until all the real estate embraced in the decrees has been sold. The judge of probate must attend such sales, and make a record thereof in a book, to be kept by him in his office for that purpose, in which he shall describe each parcel of real estate sold, and state to whom sold, the price paid by the purchaser, the date of sale, and if no sale was effected, stating that fact, and the reason therefor, and also, in separate columns, the amounts, as taken from the book or docket in which the decrees are entered, of each kind of tax, penalties, and of the fees and costs in each case; and he must also enter in such docket, in each case, the land sold under the decree in that case, the purchaser thereof, and the amount at which it was sold.

Ib. sec. 98.

578. How real estate offered for sale; minimum price.—It shall be the duty of the tax-collector, in making such sales, if practicable, to so offer such real estate for sale that only such portion thereof may be sold as is necessary to satisfy the decree under which it is sold, and the expenses of sale; but no sale shall be made for a sum less than the amount of such decree and expenses.

Ib. sec. 91.

579. Second sale on failure of bidder to pay.—The party to whom any real estate at such sale is knocked off, shall forthwith pay to the collector the amount of his bid, and, on his failure to do so, the collector must proceed at once to again offer it for sale.

Ib. sec. 96.

580. When real estate bid in for state.—If no person shall bid for any real estate offered at such sale an amount sufficient to pay the sum specified in the decree of sale, and the costs and expenses subsequently accruing, the judge of probate shall bid in such real estate for the state, at a price not exceeding the sum specified in such decree and such subsequently accruing costs and expenses.

State v. Brewer, 64 Ala. 287.

Ib. sec. 101.

581. Certificate to purchaser; contents.—As soon after the sale as practicable, the tax-collector must make out and deliver to each purchaser, other than the state, a certificate of purchase, which shall contain a description of the real estate sold, and show that the same was assessed by the assessor, to whom assessed, the date of assessment, for what year or years the taxes were due, the amount of taxes due thereon, distinguishing the amounts due the state and county, and for school purposes, and the fees and costs, that it was advertised and how long, and that it was offered for sale, and at what time, and who became the purchaser, and at what price.

Ib. sec. 97.

582. Certificate of purchase to state; lands bid in not thereafter assessed.—For the real estate bid off for the state, in each case, the judge of probate shall make out a certificate of purchase to the state, of like import to the one provided for in the preceding section, and deliver the same to the tax-collector, who shall, on final settlement, deliver all certificates received by

him from the judge of probate to the auditor, who shall cause the same to be recorded in a book kept in his office for that purpose, and properly indexed for convenient reference. Lands bid in for the state shall not be thereafter assessed, except as hereinafter provided, until the same have been redeemed from, or sold by the state.

583. Abbreviations in advertisements and entries authorized.—In all advertisements and notices of the proceedings in the probate court for the sale of lands for taxes, and of such sales, and in all entries required to be made by the judge of probate, tax-collector, or other officer, initial letters, abbreviations and figures may be used to indicate townships, ranges, sections, parts of sections, blocks and lots, and dates and amounts; and, in estimating the costs of publication, each amount, date, or number, and each initial letter or abbreviation shall be counted as a word. Ib. secs. 92, 90.

584. Advertisements of sale; what part paid by state. The cost of advertising the caption and conclusion of notices for the sale of real estate for the payment of taxes, and so much thereof as pertains to those portions of such real estate as are bid off for the state, must be paid by the state; and the auditor shall, after every such sale, audit the account of the owner or proprietor of the newspaper in which such notices were published, and shall draw his warrant on the treasurer in favor of such owner or proprietor for the amount he may find to be lawfully due him, and payable by the state, and the treasurer shall pay the same; but the state shall pay no other costs attending any tax sale. Ib. secs. 90, 97.

585. What portion of such advertisements payable by collector.—The cost of advertising the part of such notices, pertaining to lands purchased by others than the state, shall be covered by the bids of the purchasers, and collected by the collector as part of the purchase-money, but for the use of the owner or proprietor of the newspaper in which such notices were published, and by the collector paid over to him on demand; and for such portions of such costs, as well as for the cost of advertising lands inserted in the notice by the mistake of the collector, such collector and the sureties on his official bond shall be liable to the owner or proprietor of such newspaper. Ib. sec. 90.

586. Certificate of purchase assignable.—The certificate of purchase, delivered by the tax-collector to a purchaser at such sale, is assignable by indorsement; and an assignment thereof vests in the assignee, and his legal representatives, all the right and title of the original purchaser. Ib. sec. 102.

587. Officers forbidden to purchase at sale; penalty; sale void.—If the assessor, collector, judge of probate, or other presiding officer of the court of county commissioners shall, directly or indirectly, be concerned or interested in the purchase of any real estate sold for taxes, the sale shall be void, and he and the sureties on his official bond shall be liable to a penalty of not exceeding five hundred dollars, to be fixed by the jury, which may be recovered in an action in the circuit court, or court of like jurisdiction, brought on the relation of any taxpayer of the county, in the name of the state, one-half of the Ib. sec. 100.

amount recovered to be paid to the relator, and the other half to the state.

Ib. sec. 93.

588. Appeal from decree of sale, and proceedings thereon. From any decree rendered by the probate court for the sale of real estate for the payment of taxes, the defendant in the cause, or the state, in behalf of itself and the county, may appeal to the next term of the circuit court, or court having like jurisdiction, of the county, within thirty days after the rendition of the decree. If the defendant appeals, he must execute a bond in double the amount of the decree, payable to the State of Alabama, with sufficient surety, to be approved by the judge of probate, and conditioned that he will prosecute the appeal to effect, and pay such judgment as the appellate court may render thereon; but the state shall not be required to execute any bond. The solicitor of the circuit or county shall represent the state on such appeal, and of the pendency thereof the judge of probate must give him notice in writing; and on appeal by the state, notice thereof shall be given the defendant, as in other cases of appeal from that court to the circuit court. Such appeal must be tried de novo, upon an issue made up under the direction of the court. If the defendant appeals, and the issue is decided adversely to him, the court must render judgment against him and his sureties in favor of the state for the amount of the taxes, fees and costs, besides the costs of the appeal; and such judgment shall be a lien upon the lands described in the decree from which the appeal was taken, which lien, with a description of the lands, must be declared in the judgment.

Ib. sec. 94.

589. Disposition of money collected on judgment.—Any money collected on such judgment, except for costs of court, must be paid to the tax-collector, who shall account for and pay the same over to the officers and persons entitled to receive the same.

Ib. sec. 95.

590. Fees and costs.—The judge of probate shall receive twenty cents for every notice issued by him, and fifty cents in lieu of all costs and charges on every decree; the tax-collector shall have twenty-five cents for serving each notice, but for his attendance at court he shall receive no pay; and in case of appeal, the sheriff and the clerk of the appellate court shall be entitled to the same fees as for like services in other cases.

Ib. sec. 95.

591. Disposition of excess of purchase-money.—The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, and costs and expenses subsequently accruing, shall be paid over to the owner, or his agent, or to the person legally representing such owner, or into the county treasury on his account; and if deposited in the county treasury, it may be paid therefrom to such owner, agent, or representative in the same manner as the excess arising from the sale of personal property sold for taxes is paid.

Ib. secs. 113, 114.

592. Deed to purchaser.—After the expiration of two years and six months from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to each purchaser, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the judge of probate, a deed to the real estate purchased, as described in the certificate, including therein, if desired by the purchaser, any number of

parcels or lots purchased by him at such sale; and such deed, when properly acknowledged and recorded, shall convey to, and vest in the grantee all the right, title, interest and estate of the former owner of such real estate, and of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the state and county thereto; but it shall not convey the right, title, or interest of any reversioner or remainderman therein.

Jones v. Randle, 68 Ala. 258; Lassitter v. Lee, Ib. 287.

593. Deed to be acknowledged; effect as evidence.—Such deed shall be signed by the judge of probate in his official capacity, and by him acknowledged before some officer authorized to take acknowledgments of deeds, and it shall be, in all the courts of the state, prima facie evidence of the facts recited therein, in any controversy, proceeding, or suit involving or concerning the rights of the purchaser, his heirs, or assigns to the real estate thereby conveyed. Ib. sec. 114.

594. Forms of certificates and deeds prepared and distributed.—The attorney-general must furnish the auditor with suitable forms of certificates of purchase and deeds to purchasers at sales of real estate for taxes, from which the auditor shall cause to be printed a sufficient number of blank certificates and deeds, and distribute the same among the several judges of probate, to be used by them and tax-collectors on sales of lands for taxes. Ib. s c. 115.

595. When judge of probate not to make deed.—If, at any time before executing to the purchaser a deed to any real estate sold for taxes, it shall be made to appear to the satisfaction of the judge of probate that such real estate was not subject to taxation, or that the taxes thereon had been paid prior to the sale, he shall not execute a deed therefor, but shall make an entry in the record of sales, opposite such real estate, that the same was erroneously sold, and such entry shall be prima facie evidence of the fact therein stated. Ib. sec. 111.

596. Assessment of lands bid in by the state, and not redeemed or sold.—It shall be the duty of the auditor to transmit to the tax-assessor of each county, by the first day of August of each year, a descriptive list of all the lands in the county reported to him as bid in for the state, and not redeemed or sold; and is shall be the duty of the assessor to assess such lands at a fair valuation, and return the same to the auditor, who shall thereupon add such assessment to the amount for which the land was sold; and the assessor shall furnish to the judge of probate a copy of the list and assessment returned to the auditor, and such judge shall enter the assessment of each tract or parcel of land so made on the record of sale thereof kept in his office. Ib. sec. 99.

CHAPTER 6.

RIGHTS AND REMEDIES OF PURCHASERS OF LAND AT TAX-SALE; STATUTE OF LIMITATIONS.

Ib. sec. 103.

597. When sale invalid, lien of state and county passes. When the sale of any land sold for the payment of taxes is, for any cause, ineffectual to pass the title to the purchaser, except in the cases in which such sales are in this title expressly declared to be invalid, such sale shall operate as an assignment to the purchaser of the rights and liens of the state and county in and to the land sold.

Ib. sec. 104.

598. Liability, when land not liable is sold.—When lands are sold for taxes which are not liable therefor, the purchaser may recover from the officer by whose fault or neglect the assessment or sale was made, and the sureties on his official bond, the amount of purchase-money paid by him therefor, with interest thereon from the day of sale.

Ib. sec. 105.

599. Purchaser may bring ejectment or unlawful detainer. The purchaser of lands at a tax-sale, or any one claiming under him, may, after the expiration of six months from the day of sale, maintain an action of ejectment, or of unlawful detainer, or a statutory real action in the nature of ejectment, for the recovery of the possession of the lands purchased at such sale, and shall be entitled to hold the possession thereof, on a recovery, but subject to the right of redemption hereinafter provided for.

Ib. sec. 106.

600. When plaintiff recovers purchase-money, etc., though cast in suit for land.—If, in any suit brought by the purchaser or other person claiming under him to recover the possession of lands sold for taxes, a recovery is defeated on the ground that such sale was invalid for any other reason than that the taxes were not due, the court shall forthwith, on the motion of the plaintiff, impanel a jury to ascertain the amount of taxes for which the lands were liable at the time of the sale, and for the payment of which they were sold, with interest thereon from the date of sale, and the amount of such taxes on the lands, if any, as the plaintiff, or the person under whom he claims, has, since such sale, lawfully paid, with interest thereon from the date of such payment, the interest on both amounts to be computed at the rate of twelve per cent. per annum; and the court shall thereupon render judgment against the defendant in favor of the plaintiff for the amount ascertained by the jury, and the costs of the suit, which judgment shall constitute a lien on the lands sued for, and payment thereof may be enforced as in other cases.

Ib. sec. 107.

601. When defendant entitled to judgment for same, though cast in suit for land.—If, in a suit brought against such purchaser, or other person claiming under him, to recover possession of lands sold for taxes, the defendant claims and defends under the tax title, and his defense fails on the ground that such sale was invalid for any other reason than that the taxes were not due, and the plaintiff recovers, the court shall

forthwith, on the motion of the defendant, impanel a jury to ascertain the amount of taxes for which the lands were liable at the time of the sale, and for the payment of which they were sold, with interest thereon from the day of sale, and the amount of such taxes on the lands, if any, as the defendant, or the person under whom he claims, has, since such sale, lawfully paid, with interest thereon from the date of such payment, the interest on both amounts to be computed at the rate of twelve per cent. per annum; and the court shall thereupon render judgment against the plaintiff in favor of the defendant for the amount ascertained by the jury, and the costs of the suit, which judgment shall constitute a lien on the lands sued for, the payment of which may be enforced as in other cases; and no writ of possession shall issue until such judgment has been satisfied.

602. Tender by party claiming adversely to tax-title, and effect thereof.—In any suit under the provisions of either of the last two preceding sections, the party claiming adversely to the tax-title may, at any time, tender the amounts required in such sections to be ascertained by the jury, with interest as therein prescribed; and no costs accruing after such tender shall be recovered of him, if, upon a refusal of the tender, he shall pay such amounts into court. Ib. sec. 107.

603. Statement of claims under tax-title made in pleadings.—In a suit brought to recover the possession of lands, if either party claims under a tax-title, he must, in order to entitle himself to the benefits of sections 600 and 601, state in his complaint or plea, that he claims or defends, as the case may be, under a tax-sale, giving the date of such sale; and such statement shall be a sufficient averment of the facts necessary to entitle him to such benefits. Ib. sec. 108.

604. Effect of redemption or tender in suit by party claiming under tax-title.—If, in any suit brought to recover the possession of lands sold for taxes, by or against the purchaser, or other person claiming under him, it is shown that the party claiming adversely to the tax-title, being entitled to redeem, made within the time allowed for redemption, the payment required by law for the redemption of such lands, or made tender thereof, and the amount of such tender has been paid into court for the opposite party, judgment must be rendered in his favor for the costs accruing after such payment or tender. Ib. sec 109.

605. Books, etc., of judge of probate and collector as evidence.—Unless otherwise provided, on the trial of any issue involving the sale of real estate for taxes, or the redemption thereof, the books and records belonging to the office of the judge of probate or tax-collector, and required by law to be kept, or certified copies therefrom, shall be prima facie evidence of the facts stated therein. Ib. sec. 110.

606. Statute of limitations as to recovery of lands sold for taxes.—No action for the recovery of real estate sold for the payment of taxes shall lie, unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor; but if the owner of such real estate was, at the time of such sale, under the age of twenty-one Ib. sec 112

years, or insane, he, his heirs, or legal representatives, shall be allowed two years after such disability is removed to bring suit for the recovery thereof.

Jones v. Randle, 68 Ala. 258; Lassitter v. Lee, Ib. 287.

CHAPTER 7.

REDEMPTION OF LANDS SOLD FOR TAXES; SALES BY THE STATE.

Feb. 17, 1885, p. 21, sec. 116.

607. Persons entitled to, and time allowed for redemption. Real estate sold for taxes may be redeemed at any time before the expiration of two years and six months from the time it is bid off, whether for the state or by any other purchaser, by the owner, his heirs, or personal representative, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor, or other creditor having a lien thereon, or on any part thereof; and an infant or lunatic entitled to redeem may redeem at any time within one year after the removal of his disability; but such redemption shall not be of less than the entire land which was the subject of any one sale; and such redemption may be made through an agent.

Ib. sec. 116.

608. Mode and terms of redemption.—To obtain such redemption, the party entitled thereto must deposit with the judge of probate of the county in which the land is situate the amount of money for which the lands were sold, with interest thereon at the rate of fifteen per cent. per annum, all taxes which have been assessed upon the lands sought to be redeemed since the day of sale, whether as an assessment against a taxpayer, or on the descriptive list of lands bid in for the state sent to the assessor by the auditor, with interest thereon at the rate of eight per cent. per annum, and all costs to officers that may have legally accrued, unless such taxes and costs have been already paid by him, which may be shown by the receipt of the tax-collector, and one dollar to the judge of probate as his fee upon such redemption; and if the redemption is by a mortgagee, or other creditor entitled to redeem, or by any other person having an interest, but not the legal title, he shall have a lien on the lands for the money expended by him in effecting the same; and if by a tenant in common, he shall have a like lien on the interest of his co-tenant.

Ib. sec. 116.

609. Purchaser to demand possession; effect of failure. The time within which the owner of any land for taxes, and purchased by any person other than the state, if such owner is known to such purchaser, may redeem such land, shall not commence to run until such purchaser or his agent shall make a personal demand on such owner for possession, or shall deposit such demand in the post-office, duly enveloped and with postage prepaid, and addressed to such owner at the post-office of his usual place of residence; and if made in the latter mode, the purchaser, or his agent having knowledge of the facts, shall, within sixty days thereafter, file in the office of the judge of probate of the county in which the land is situate, a copy of

such demand, with an affidavit showing when, and in what post-office such demand was deposited, and how, and to whom it was addressed.

610. Certificates of redemption, and of release.—Upon the payment of the amount required by law for the redemption of lands sold for taxes by a party entitled to redeem, the judge of probate must issue to such party a certificate of redemption, setting forth the facts of the sale, substantially as contained in the certificate of purchase, the date of redemption, the amount paid, and by whom the lands are redeemed; and he must make the proper entries in the book of sales in his office, and immediately give notice of such redemption to the county treasurer; and the certificate must then be presented to such treasurer, who shall countersign the same, and unless so countersigned, no certificate shall be held as evidence of such redemption. If such lands were bid in by the state, the person redeeming shall present the certificate of redemption to the auditor, who shall give to such person a certificate, releasing all claims to the lands acquired by the state at the tax-sale. Ib. sec. 117.

611. Redemption money for; where deposited, and how paid over.—If the lands redeemed were bid in by any person other than the state, the redemption money must be deposited by the judge of probate in the county treasury, and there kept separate and apart from the general funds of the county; and upon the demand of the purchaser, his personal representative, or assignee, and the surrender of the certificate of purchase, the judge of probate must give him an order on the treasurer for the same. Ib. sec. 118.

612. Report of lands bid in by state and redeemed; distribution of proceeds.—On the last business day in March, and every three months thereafter, the judge of probate of each county shall certify to the auditor and to the county treasurer, upon blanks to be furnished by the auditor, a full and correct statement of all real estate bid in by the state and redeemed, showing separately the amount of state, county and school taxes, and penalties and costs; and, at the same time, he shall pay such taxes and penalties to the respective officers entitled to receive the same; and within five days after the redemption of any real estate bid in by the state, he shall notify the tax-assessor and tax-collector of his county thereof, and shall, on demand, pay to them the costs and fees to which they are respectively entitled; and the assessor shall enter such real estate, and the name of the party redeeming the same, on an appropriate list, to be kept by him, for assessment. Ib. secs. 119, 120.

613. Purchaser not liable for rents on redemption; exception.—Neither the purchaser nor any one claiming under him, who may have lawfully obtained possession of any real estate purchased at tax-sales, shall be liable, upon the redemption of such real estate, to account to the owner for any rents, issues, or profits during such possession, but as to such rents, issues and profits, he shall be held and considered the rightful owner of such real estate, unless such owner, at the time of the sale, was a minor, or person of unsound mind, and had no guardian, or his guardian was not lawfully served with notice of the proceedings had in the court of probate for the sale of such real estate, in which event such purchaser, or other person in possession, shall be liable for rents, issues and profits, as in other cases. Ib. sec. 121.

Ib. sec. 122.

614. Description of lands bid in by state, etc., prepared by auditor; sale thereof.—It shall be the duty of the auditor to cause to be prepared a suitable book, in which shall be entered a description, as accurate as can be obtained, of all the lands which have been bid in by the state, with the amount of state and county taxes due thereon, the date when such lands were bid in, and the lowest market value thereof; and, when the time for redemption has expired, such portions of such lands as have not been redeemed shall be subject to sale by the state; and the auditor, with the approval of the governor, may sell the same at private sale to any purchaser who may pay therefor in cash to the treasurer such sum of money as the auditor and treasurer may, from consultation with the tax-collector and others who are acquainted with the lands, ascertain and determine to be the fair value thereof; and on payment of the purchase-money, the auditor, in behalf of the state, shall execute to the purchaser a deed, duly acknowledged, without warranty or covenant of any kind on the part of the state, express or implied, conveying to him all the right, title and interest of the state in and to the lands purchased by him; and such purchaser shall thereafter have all the right, title and interest of the state in and to such lands, and shall be held and treated as the assignee of all the taxes due upon such lands, or for which they were sold, and the penalties, and of all the taxes that should have been, under the law, assessed upon the same, if they had been the property of a private citizen of the state; and he shall be clothed with all the rights, powers and remedies as to acquiring possession, or, if acquired, as to defending the same, as if he had purchased such lands at the sale made by the tax-collector; and the auditor shall furnish a description of such lands to the assessor of the county in which they are situate, who shall enter the same upon his list for assessment; but the time allowed infants and lunatics, in which to redeem lands sold for taxes, shall in nowise be affected by the provisions of this section.

Ib. sec. 123.

615. Purchase from the state by owner, mortgagee, etc. After the expiration of the time allowed by law for the redemption of any land bid in for the state, unless the same has been sold under the preceding section, any person, who had the right to redeem, may purchase such lands from the state by obtaining from the auditor a statement of the amount due upon such lands, as provided in cases of redemption, and paying such amount to the treasurer; and the auditor, upon the delivery to him of the treasurer's receipt for such payment, shall execute a deed for such lands to such person, as provided in the preceding section, if satisfied from the proof adduced that such person was entitled to redeem such lands during the time allowed for redemption.

Ib. sec. 124.

616. How county taxes, fees, etc., distributed. — When lands bid in by the state have been redeemed from, or sold by the state, under any of the provisions of this chapter, the auditor shall draw his warrant on the treasurer in favor of the judge of probate of the county in which the lands lie, for the county and school taxes, and the fees and costs due to the different officers of the county, specifying each separately; and if the same cannot be ascertained from the records and papers of his office, the judge of probate, on notice by the auditor of such redemption or sale, must certify the same to him; and the judge of pro-

bate, upon the collection of such warrant, shall pay the same over to the officers entitled thereto, or authorized by law to receive the same.

617. Effect of failure to redeem lands bid in by state.—The right to redeem any real estate bid in for the state shall be forfeited, unless such real estate is redeemed within the time prescribed in this chapter; and if not redeemed within that time, all the right, title and interest of the owner of such real estate, and of the person whose duty it was to pay the taxes thereon, in and to such real estate, shall be transferred to, and absolutely vested in the state. Ib. sec. 125.

CHAPTER 8.

GENERAL DUTIES OF AUDITOR IN SUPERVISING THE ENFORCEMENT OF THE REVENUE LAWS; MISCELLANEOUS PROVISIONS.

618. Duties of auditor as to enforcement of revenue laws. The enforcement of the revenue laws of the state shall be under the general supervision and direction of the auditor, who shall, by general rules, and, if need be, by specific instructions, direct the tax-assessors and tax-collectors in the discharge of their duties; and in case of doubt, he shall, after taking the opinion of the attorney-general, advise the assessors and collectors as to the construction to be placed upon the law; and such rules, instructions and advice, when followed or conformed to, shall protect them as against the state. He shall see that the returns, reports, payments and settlements, required by law to be made by any and all officers charged with the performance of any duties under this title, are promptly made by such officers at the time or times they are required to be made; and in default of the performance by any of them of any of such duties, he shall promptly direct such prosecutions or other legal proceedings as may be by law authorized or directed. Feb. 17, 1885, p. 21, sec. 126.

619. Assessment lists; form and printing of.—It shall be the duty of the auditor to prepare and cause to be printed a blank form of assessment list, specifying therein the different species of property, with appropriate blanks for a description of each, and the other subjects of taxation, which are required by law to be returned by the tax-payer to the tax-assessor for taxation; and upon this form he may cause to be placed an abstract of the duties of the tax-payers in returning their lists, and of their duties and liabilities as declared by law, and such instructions to the assessors as will advise them of their duties in making assessments of property and other subjects for taxation; and he shall furnish each assessor one or more of such forms, so that the assessor may cause to be printed, or otherwise prepared, as many copies thereof as may be needed in his county. The auditor shall also furnish to the judges of probate of the several counties blank forms, whereon are to be returned to him the abstracts of the property and other subjects of taxation, polls and taxes, required by law to be returned to him by such officers. Ib. sec. 128.

Ib. sec. 129.

620. Duty of auditor as to institution of suits; agreed statement of facts.—It shall be the duty of the auditor to cause suit to be brought, in the name of the state, against any and all persons by law charged with the collection of state taxes, or with any duty in regard to the state revenue, and their sureties, for failure to collect such taxes or to perform such duty; and he may also, in such cases as, in his judgment, the interest of the state requires it, cause suit to be brought against defaulting tax-payers for the taxes claimed from them by the state; and, in cases in which a reasonable doubt may exist as to the construction or validity of the law under which taxes are claimed, he may authorize an agreed statement of the facts of the case to be made for the speedy adjudication of the matter in controversy.

Ib. sec. 137.

621. Failure to give collector credit for commissions; how corrected.—When the auditor finds that he has failed to give any tax-collector credit for commissions to which he is entitled, he is authorized to correct such error in his settlement with such collector; and if the account of such collector has been closed, and such commissions have been paid into the state treasury, the auditor shall draw his warrant on the treasurer for the amount thereof in favor of such collector.

622 (506). **Warrant for over-payments.**—The auditor must draw his warrant on the treasurer in favor of any judge of probate, tax-collector, or county treasurer for any amount overpaid into the treasury by such judge of probate, tax-collector, or county treasurer.

Ib. sec. 136.

623. Taxes a preferred claim in case of general assignment or insolvency.—When a tax-payer makes a general assignment of his property for the payment of his debts, or when dead, and his estate is or becomes insolvent, any unpaid taxes assessed against him, or against his estate, shall be a preferred claim, and shall be paid by the assignee or personal representative out of the first money received by him belonging to the trust or estate.

Ib. sec. 136.

624. Officer selling property under decree or process to first pay taxes.—When any sheriff or other officer shall sell any property under execution or other process, or under any decree, judgment, or order of any court, it shall be his duty to ascertain what taxes are a lien upon such property, and, upon a sale thereof, to first apply the proceeds of such sale to the payment of such taxes.

Holding v. Thomas, 62 Ala. 4.

Ib. sec. 135.

625. Liability of agent for taxes on receipts.—When taxes are levied on the gross or net receipts of any person, company, corporation, or association doing business in this state by an agent, such agent shall be personally liable for such taxes, and the tax-collector may collect the same from such agent by garnishment, or by the seizure and sale of any personal property belonging to him, as if such taxes were assessed against him.

Ib. sec. 129.

626. Copies of papers, records, etc., in auditor's office as evidence.—In any suit against any tax-assessor, tax-collector, judge of probate, or other officer charged with the performance of any duties under this title, and his sureties, or either, for failure to pay over any money collected by him for the state, or to perform any other duty required of him by law, a copy of any bond,

record, book, paper, contract, return, or other document, or of the official statement of any account between him and the state, in the office of the auditor or treasurer, certified by the auditor, if the original is in his office, or by the treasurer, if in his office, under the great seal of the state, shall be received as evidence in any case in which the original would be competent, unless the defendant shall deny under oath that he made or executed such original.

627. Assessor and collector may contract for stationery, printing, etc.—The tax-collector and tax-assessor are authorized to purchase necessary books and stationery, and to contract for the necessary printing in their respective offices, with the approval of the court of county commissioners. Ib. sec. 132.

628. Penalty against officer failing to pay over money collected.—Upon a verdict being returned in favor of the state, in any suit brought by the state against any officer charged with the collection of any revenue for the state, and his sureties, or either, for the recovery of any such revenue collected by him, a judgment must be rendered for the amount of such verdict, and twenty per cent. thereon. * Ib. sec. 41.

CHAPTER 9.

LICENSES.

ARTICLE 1.—Business and callings for which licenses are required; prices of licenses.

2.—Issue and expiration of licenses, and other general provisions.

ARTICLE I.

BUSINESS AND CALLINGS FOR WHICH LICENSES ARE REQUIRED; PRICES OF LICENSES.

629. Persons required to take out licenses, and prices to be paid therefor.—Licenses are required of all persons engaging in, or carrying on any business, or doing any act in this section Dec. 12, 1884, p. 3, sec. 14.

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* On Feb. 18, 1887, "An act to amend section 499 of the Code of Alabama," was approved (Pamph. Acts 1886–7, p. 143); and the section, as amended, is as follows:

"Section 499. **Cities and towns may adopt provisions of this chapter.**—Any incorporated city or town in this state may, by an ordinance, adopt the provisions of this chapter, regulating the assessment and collection of taxes by such city officers or agents, so far as the same may be applicable, and shall have the same right to sell property and make titles to property sold for taxes, as is provided for collecting state and county taxes; but any such city or town must first, by ordinance, adopt such parts of this chapter for said purposes as they desire to put in force; but no city (except Mobile, Montgomery, Marion, Brewton, Cullman and Selma), or town, or county shall assess, levy or collect any license tax on any business or occupation, upon which the state does not assess, levy, or collect such license tax. Nothing herein contained shall affect the provisions of the act for the reduction and funding of the debt of the city of Mobile, approved March 9th, 1875. The city council of Opelika may assess, levy and collect a license tax on banks or bankers, the keepers of livery stables, of meat markets, and those engaged in the business of running drays and hacks for hire." The provisions of the chapter referred to (chapter 2 of title VII. of part 1 of Code of 1876) were superseded by subsequent legislation embodied in this Code, in which no provision of like import to that embraced in section 499 of Code of 1876 was contained; and hence, it was omitted by the commissioners from this Code. The chapter referred to corresponds, in subject-matter, with this title of this Code.

specified, for which shall be paid, for the use of the state, the following taxes, to-wit:

Subd. 1. 1. For each public race-track, at or within five miles of any city or town containing less than five thousand inhabitants, one hundred dollars; at or within five miles of any city or town containing more than five thousand inhabitants, two hundred dollars.

Subd. 2. 2. For the retail of spirituous, vinous, or malt liquors, on any steamboat or other water-craft, or on any sleeping, dining, or buffet-car, two hundred and fifty dollars, for which the state shall have a preferred lien on such steamboat or other water-craft, and cars named; and such lien may be enforced whenever any such liquors are retailed by any person on such steamboat or other water-craft, or cars, with the knowledge or consent of the captain, or conductor, without having first procured a license therefor, as provided by law; and the tax-collector of any county in which such steamboat or other water-craft may ply, or cars run, is required to enforce such lien in the same manner, and by the same proceedings, as are authorized for the collection of taxes on personal property.

Subd. 3. 3. For retailers of spirituous, vinous, or malt liquors in any city, town, village, or any other place, of less than one thousand inhabitants, one hundred and twenty-five dollars; in any city, town, or village of more than one thousand, and less than three thousand inhabitants, one hundred and seventy-five dollars; and in any city or town containing three thousand or more, and less than ten thousand inhabitants, two hundred and fifty dollars; and in any city of more than ten thousand inhabitants, three hundred dollars. But dealers in lager beer exclusively shall be charged one-fourth of the above rates. Any person who pays for and takes out a license as a retailer, shall not be required to pay for, and take out a license as a wholesale dealer in such liquors; and when a retail license is taken out after the first day of January, and before the first day of July, the price of the license shall be the same as for a license for twelve months. Any person who sells or disposes of spirituous, vinous, or malt liquors, or intoxicating bitters, in any quantity less than a quart, shall be deemed a retail dealer.

Subd. 4. 4. For wholesale dealers in spirituous, vinous, or malt liquors in any place, two hundred dollars. Any person dealing in said articles, who shall sell, barter, or exchange, or in any way dispose of, or permit to be taken, spiritous, vinous, or malt liquors, in any quantity less than one quart, or who shall permit the same to be drunk by the glass, or single drink, in or about his place of business, shall be deemed a retail dealer; and any dealer so disposing of spirituous, vinous, or malt liquors, only in the quantity of one quart or more, shall be deemed a wholesale dealer.

Subd. 5. 5. For compounders and rectifiers of spirituous or vinous liquors, two hundred dollars. Any person who rectifies, purifies, or refines distilled spirits or wines, by any process, or who mixes distilled spirits or wines with any chemicals, or compounds liquors for sale under any name, shall be deemed a compounder and rectifier.

6. For distillers of spirituous liquors, two hundred dollars; but this shall not apply to the distilling of fruits. Subd. 6.

Grant v. State, 73 Ala. 13; Johnson v. State, 44 Ala 414.

7. For brewers, fifteen dollars. Subd. 7.

8. For bowling alleys, for the use of which money or other compensation is charged, twenty-five dollars for each alley; and for each bowling alley kept in connection with a drinking saloon, whether compensation is charged or not, twenty-five dollars. Subd. 11.

9. For each billiard table, for the use of which money or other compensation is charged, and which is not kept in connection with the business of a bar-room or drinking saloon, twenty-five dollars. Subd. 12.

10. For each billiard table kept in connection with the business of a bar-room or drinking saloon, whether its use be charged for or not, fifty dollars. Subd. 13.

11. For each table upon which the game of pin-pool is played, one hundred dollars. Subd. 14.

12. For each table upon which a game of pool is played with fifteen balls, more or less, and not pin-pool, for the use of which money or other thing of value is charged, or, when kept in connection with a bar-room or drinking saloon, whether its use be charged for or not, fifty dollars. Ib.

13. For each bagatelle or Jenny-Lind table, or any other table or device of any kind from which any kind of profit is derived by the keeper, fifty dollars. Subd. 15.

14. For each table or device, or set of dominoe bones, kept in connection with a bar-room or drinking saloon for use in playing the game commonly known as dominoes, twenty-five dollars; and for each dice-box and dice kept in a bar-room or drinking saloon, twenty-five dollars. Subd. 13.

15. For each theatre in towns or cities containing more than eight thousand inhabitants, one hundred dollars; but this price shall not be charged for licenses for open air or summer theatres, such as at Mobile on the bay shore, and known as Frascati, but for each such open air or summer theatre, twenty-five dollars; in towns or cities containing less than eight thousand and more than two thousand inhabitants, fifty dollars; and in towns or cities containing less than two thousand inhabitants, twenty-five dollars; but the owner or manager of any theatre holding any such license must issue tickets of admission to all persons whom they admit to their exhibitions, and must thereon assign a particular seat to each such person, in such part of the theatre as the convenience of such owner or manager may require. This license shall only extend to dramatic and operatic exhibitions; and if any doubt arises as to the character of an entertainment proposed to be exhibited in any theatre, the judge of probate of the county in which the theatre is situated shall determine whether or not it is covered by the theatrical license. Subd. 16, as amended Feb. 17, 1885, p. 70.

16. For each public hall let for hire, twenty-five dollars. Ib.

17. For each concert, musical entertainment, public lecture, or other public exhibition or entertainment, where charges are made for admission, or for the use of any instrument or device, or the participation in any exercise or entertainment, not given Subd. 26.

for charitable, school, or religious purposes, and not otherwise provided for, five dollars; but the provisions of this subdivision shall not apply to exhibitions or entertainments given in theatres, where the owner or manager thereof has taken out license as owner or manager.

Subd. 22. 18. For each day's exhibition of a circus in towns or cities having more than five thousand inhabitants, or within two miles thereof, one hundred and fifty dollars; in all other places, one hundred dollars.

Subd. 23. 19. For each exhibition of a menagerie or museum, twenty dollars.

Subd. 24. 20. For each exhibition of a side show accompanying a circus, menagerie, or museum, ten dollars.

Subd. 25. 21. For each exhibition of feats of legerdemain or sleight-of-hand, or other exhibition or entertainment of like kind, ten dollars.

Subd. 28. 22. For each cockpit, two hundred and fifty dollars.

Subd. 31. 23. For each fortune teller, twenty-five dollars.

Subd. 29. 24. For each company of traders or fortune tellers, usually known as Gypsies, ten dollars for each county.

Subd. 27. 25. For each shooting gallery, twenty-five dollars.

Subd. 30. 26. For each skating rink, twenty-five dollars.

Subd. 34. 27. For dealers in playing cards, five dollars.

Subd. 17. 28. For dealers in pistols, or pistol cartridges, or bowie knives, or dirk knives, whether principal stock in trade or not, three hundred dollars.

Porter v. State, 58 Ala. 66.

Subd. 18. 29. For each peddler of medicines or other articles of like character, spectacles or eye-glasses, one hundred dollars for each county in which they peddle.

Dec. 11, 1885, p. 31, sec. 5, subd. 18. 30. For peddlers of medicines, with vocal or instrumental music, or both, two hundred and fifty dollars for each county in which they peddle.

Dec. 12, 1884, p. 3, sec. 14, subd. 9. 31. For peddlers in a wagon drawn by one horse, or other animal, forty dollars; in a wagon drawn by two horses, or other animals, fifty-five dollars; on a horse, or other animal, twenty-five dollars; on foot, fifteen dollars; when accompanied by singers or performers on any musical instruments, one hundred dollars; but for peddlers of tinware only, who shall pay all lawful fees, one-third of the license fees herein provided; peddlers of wooden and stone or clay hollow-ware only, shall not be required to procure license. A peddler's license shall entitle him to peddle only in the county where it is taken out. It shall be the duty of county court judges, justices of the peace, and notaries public having and exercising the jurisdiction of justices of the peace, mayors, recorders and intendants of cities or towns, and all officers authorized to make arrests, to demand of peddlers, itinerant dealers and traveling agents their licenses, and unless they exhibit the same, or show that they have a right under the law to peddle the articles carried by them, or to carry on the business they are engaged in without a license, such county court judges, notaries, mayors, recorders, or intendants must issue warrants for the arrest of such peddlers, itinerant dealers, or traveling agents, returnable to any court of their county having criminal jurisdiction, which warrants may

be executed by the sheriff, or by any constable of the county, any city or town marshal, policeman, or any officer having authority to make arrests. It shall, however, be lawful for any person having but one arm, or but one leg, or who labors under any other physical disability, preventing him from making a livelihood by labor, to peddle in any county in this state free of license, on the filing of the certificates of two regularly licensed physicians in the office of the judge of probate of the county of his permanent residence, to the effect that he is permanently disabled, and that he cannot by labor make a livelihood for himself or family; but this shall not be so construed as to require a license on peddlers of fish, oysters, game, fresh meats, poultry, fruit and all farm products raised by the seller.

Vines v. State, 69 Ala. 73.

32. For pawn-brokers, fifty dollars. Subd. 8.

33. For each person or firm engaged in the business of buying or selling futures for speculation, or on a commission, three hundred dollars; but this shall not be held to legalize any contract which would otherwise be invalid. Subd. 34.

34. For transient or itinerant auctioneers, or dealers in goods, wares and merchandise, other than licensed peddlers, and other than traveling agents of wholesale dealers in said articles, making sale thereof by sample, fifty dollars. Subd. 10.

35. For traveling agents of wholesale dealers in goods, wares and merchandise, ten dollars, a license to be taken out in only one county; and should any such agent fail to take out such license, all contracts made by him shall be void, and in any proceedings to enforce any such contract, the burden of proof shall be upon the party selling such goods, wares and merchandise to show that such license had been taken out at the time such contract was made. Subd. 33.

36. For itinerant dealers in fruit trees, vines, or shrubs, or plants of any kind, fifty dollars. Subd. 10.

37. The owner or master of any steamboat, or other water-craft, plying any of the rivers of this state, who engages in the business of buying, selling, or bartering any goods, wares, merchandise, produce, or commodity whatever, on or from such boat or water-craft, must pay a license of two hundred and fifty dollars; and the party so licensed shall thereby be entitled to carry on such business on the boat or water-craft therein named in any county in which the same is navigated; but cities and towns, in which such person engages in such business, may impose such license as is exacted of like business in such city or town. Subd. 32.

38. The owner, conductor, or person in charge of every supply car, or car from which any goods, wares, or merchandise are sold, whether to the servants of the railroad company, or to others, must pay a license of one hundred dollars; and the person so licensed shall thereby be entitled to carry on such business in the car therein named, in any county in which such car is run or drawn; but each of such counties may charge a license therefor of ten dollars. Subd. 32.

39. Each lightning-rod company selling lightning rods in person or through agents, and all persons engaged in the business of selling lightning-rods, shall pay to the state a license tax of fifty dollars. The payment of this tax to the state, evidenced Subd. 19.

by the receipt of any judge of probate, shall exempt such company or person from the payment of such tax in any other county; but in each county in which such company or person carries on such business, a license tax of ten dollars shall be paid for county purposes.

Subd. 20. 40. Each sewing machine, stove, range, or clock company, selling sewing machines, stoves, ranges, or clocks, either in person or through agents, or consignees, and all persons who engage in the business of selling sewing machines, stoves, ranges, or clocks, shall pay to the state twenty-five dollars for each county in which they may so sell; but when merchants, engaged in a general business, keep sewing machines, stoves, ranges, or clocks, as a part of their stock in trade, they shall not be required to pay the tax herein provided.

Merritt v. State, 59 Ala. 46.

Subd. 21. 41. Each and every person, partnership, or corporation, who engages in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this state, shall pay a license tax of three hundred dollars; and the payment of this tax to the state, evidenced by the receipt of any judge of probate, shall exempt such person, partnership, or corporation from the payment of such tax in any other county; and payment of such tax shall not, when it has been paid by such person, partnership, or corporation, be required of any of their agents or correspondents in the state.*

Feb. 17, 1885, p. 21, sec. 48. **630. Licenses for county purposes; amounts, how determined.**—The court of county commissioners of each county, except in cases otherwise provided, may, at any regular or special term, add to the taxes specified in the last preceding section such amounts, not exceeding fifty per cent. of such taxes, for county purposes, as, in their judgment, may be necessary.

ARTICLE II.

ISSUE AND EXPIRATION OF LICENSES, AND OTHER GENERAL PROVISIONS.

Dec. 12, 1884, p. 3, sec. 8. **631. Unlawful to engage in certain businesses without license.**—It shall be unlawful for any person, firm, or corporation to engage in or carry on any business, or do any act for which a license is by law required, without having first paid for and taken out a license therefor in the manner in this article provided.

Ib. secs. 5, 8, 9; Feb. 17, 1885, p. 21, sec. 53. **632. Payment for, and issue and contents of license.**—Before any person, firm, or corporation shall engage in, or carry on any business, or do any act, for which a license is by law required, he or they shall pay to the judge of probate of the county in which it is proposed to engage in, or carry on such business, or to do such act, the amount required for such license; and upon such payment, and a fee of fifty cents to such judge for issuing the same, such judge shall issue the license, countersigned by him, in the form, and on a blank to be fur-

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* By act approved February 28th, 1887 (Pamph. Acts 1886–7, p. 105), foreign insurance companies, not including "any secret or benevolent society, such as Masons, Odd Fellows, Knights of Pythias, Knights of Honor, Iron Hall, or orders of like kind," are required to "pay into the state treasury the sum of one hundred dollars per annum for the privilege of carrying on such business" in the state.

nished by the auditor, which shall set forth the name of the person, firm, or corporation applying therefor, the business or act which it is proposed to carry on or do thereunder, the location where it is proposed to carry on such business, or to do such act, the amount paid for such license, and the time for which it is issued; and if the license is for a peddler, whether he proposes to travel on foot, on horse, or in a wagon; and such license shall not be transferable, nor shall it entitle the holder thereof to carry on any other business, or to do any other act than that named therein, or at any other location than that therein specified.

Powell v. State, 69 Ala. 11; Wharton v. King, Ib. 365.

633. Report of licenses issued, and payment of money collected; commissions.—On the last secular day in March, and every three months thereafter, the judge of probate shall forward to the auditor a certified list of all licenses issued by him, stating therein for what business issued, the amount collected for each license, and from whom; and at the same time he shall pay to the state treasurer the money received by him for such licenses belonging to the state, and to the county treasurer the money received by him for such licenses belonging to the county; and for the collection of such licenses, and for such payments, he shall be entitled to commissions on the amount collected at the rate of two and a half per cent., which he may deduct from such collection. If any probate judge fails to comply with the provisions of this section, within ten days after the date at which he is required to make a report of licenses issued and money received by him, the auditor shall forthwith report the facts to the governor, who shall cite such judge to show why he has not made returns of such certified list of licenses, as required by law; and if such judge fails to show sufficient cause for such failure, the governor shall direct the attorney-general to institute impeachment proceedings against such delinquent probate judge before the supreme court of the state. Ib. sec. 11; Feb. 17, 1885, p. 21, sec. 130.

634. Expiration of licenses; time for which issued; exceptions.—All licenses shall expire on the thirty-first day of December, in each year, and shall be for one year, unless the business licensed shall commence after the first of July, in which case the price of the license shall be half the amount of the year's license. Dec. 12, 1884, p. 3, sec. 12.

635. License for selling liquors on steamboats; where issued.—Licenses for selling spirituous, vinous, or malt liquors on steamboats, or other water-craft, may be taken out in any county through which they run; and when taken out in any one of such counties, the person taking out such license may sell the liquors authorized thereby in any county in or through which such steamboat, or other water-craft, is navigated. Ib. sec. 13.

636. Licenses to retailers posted; penalty for failure.—All licenses for the retail of spirituous, vinous, or malt liquors must be kept posted up in plain sight near the bar; and a failure to comply with this section forfeits the license. Ib. sec. 13.

637. Account of licenses kept, and report thereof to auditor; inspection of books, etc., by auditor.—Each judge of probate shall keep in a book in his office, prepared for that purpose, an accurate account of all licenses received by him from the aud- Feb. 17, 1885, p. 21, sec. 53.

itor, and of the disposition made of them by him, and of all money received by him from licenses issued by him; and he shall, on the demand of the auditor, at any time exhibit to him, or to any agent appointed by him for that purpose, such book, and also the originals of all licenses then remaining in his hands and not issued.

Ib. sec. 130. **638. Forms of licenses prepared by auditor; blanks furnished judges of probate.**—It shall be the duty of the auditor, with the approval of the governor, to prepare and have printed, suitable forms of licenses, and, as often as need be, to furnish to the several judges of probate blank licenses, signed by him, sufficient for the probable wants of their respective counties, taking their receipts for the same.

TITLE VIII.

THE PUBLIC PROPERTY OF THE STATE.

CHAPTER 1.—Salt springs.
2.—Other public property.

CHAPTER 1.

SALT SPRINGS.

639 (526). **Salt springs may be leased by the governor.** The governor may lease the salt springs, and lands granted to the state under the second clause of the sixth section of the act of congress of second March, one thousand eight hundred and nineteen, to the best advantage, in conformity with the provisions of the grant.

640 (527). **Governor appoints agent.**—The governor may appoint a suitable agent, whose duty it shall be to superintend the salt springs and salt lands donated to the state by the congress of the United States; to prevent all trespass and waste on such lands; to lease the springs and lands on such terms and conditions as he may see fit; to settle all accounts with any former agent or agents, lessee or lessees; to take charge of all property of every kind on such lands; to collect all property, debts and demands, due the state from all and every person, and, generally, to save and to secure to the state whatever property, debts and demands may be due the state on account of such lands. The agent shall report, every six months, to the governor all the property of every kind collected or received, and all settlements made by him, and, generally, all his actings and doings in regard to the salt lands.

641 (528). **Compensation.**—The agent shall receive such compensation for his services as the governor may deem proper and right, not to exceed one thousand dollars for any one year, and may be removed at any time by the governor, and a successor appointed.

642 (529). **Former agents and lessees to settle.**—All former agents and lessees, and all debtors and other persons having property or debts due the state, are authorized and required to settle and deliver the same to the agent appointed by the governor under this chapter.

CHAPTER 2.

OTHER PUBLIC PROPERTY.

643 (537). **Bonds, etc., deposited with auditor, and payments made to treasurer.**—All bonds and other securities for money belonging to the state, or under the control thereof, are to be deposited with, and kept in the office of the auditor; and all payments on the same must be made to the treasurer, being first certified to him by the auditor.

644 (538). **Governor controls property unless otherwise provided.**—All property belonging to the state, not otherwise provided for by law, is under the control of the governor.

645. Meaning of property.—The word "property," in this chapter, does not include money or evidences of debt.

TITLE IX.

THE JUDICIAL ORGANIZATION OF THE STATE.

CHAPTER 1.—Judicial power, in whom vested; records; publication of notices.
2.—Supreme court and its officers.
3.—Chancery divisions and districts; courts of chancery; chancellors and registers.
4.—Judicial circuits, circuit courts; judges and clerks.
5.—Courts of probate.
6.—Sheriff.
7.—Court of county commissioners.
8.—Justices and constables.
9.—Attorneys.

CHAPTER 1.

JUDICIAL POWER, IN WHOM VESTED; RECORDS; PUBLICATION OF NOTICES.

ARTICLE 1.—Judicial power; files of courts.
2.—Substitution of records.
3.—Publication of legal notices.

ARTICLE 1.

JUDICIAL POWER; FILES OF COURTS.

646 (539). **Judicial power.**—The judicial power of the state is vested in the senate sitting as a court of impeachment; the supreme court, the circuit courts, the chancery courts, the

courts of probate, the county courts, the courts of county commissioners, the justices of the peace, and notaries public exercising the jurisdiction and powers of justices of the peace; such inferior courts of law or equity, as have been, or may be established by law; and such officers or persons as have been, or may be by law invested with powers of a judicial nature.

As amended, Dec. 11, 1886, p. 168.

647 (540). **Judge is incompetent to try certain cases.**—No judge of any court, chancellor, county commissioner, or justice must sit in any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or in which he has been of counsel, or in which is called in question the validity of any judgment or judicial proceeding in which he was of counsel, or the validity or construction of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties entered of record, or put in writing, if the court is not of record.

Lyon v. State Bank, 1 Stew. 442; Holt v. Moore, 4 Ala. 394; State v. Castleberry, 23 Ala. 85; Heydenfeldt v. Towns, 27 Ala. 423; Wilson v. Wilson, 36 Ala. 655; Ellis v. Smith, 42 Ala. 349; Hine v. Hussey, 45 Ala. 496; Hayes v. Collier, 47 Ala. 726; Newman v. State, 49 Ala. 9; Plowman v. Henderson, 59 Ala. 559; Gill v. State, 61 Ala. 169.

648 (542). **Powers of courts to inflict summary punishment.**—The power of the several courts in this state to issue attachments and inflict summary punishment for contempts, does not extend to any other cases than,—

1. Disrespectful, contemptuous, or insolent behavior in court, tending, in anywise, to diminish or impair the respect due to judicial tribunals, or to interrupt the due course of trial.

Withers v. State, 36 Ala. 252.

2. A breach of the peace, boisterous conduct, violent disturbance, or any other act calculated to disturb or obstruct the administration of justice, committed in the presence of the court, or so near thereto as to have that effect.

3. The misbehavior of any officer of the court, in his official transactions, or the disobedience or resistance of any officer of the court, party, juror, witness, or any other person, to any lawful writ, process, order, rule decree, or command thereof.

Ex parte Walker, 25 Ala. 81.

4. Deceit, or abuse of the process or proceedings of the court, by any person or party, or any unlawful interference with the process or proceedings of the court.

5. Refusing to be sworn, or to answer, either in court or before the grand jury, any lawful question as a witness or garnishee.

6. When summoned as a juror in a court, improperly conversing with a party to an action, to be tried at such court, or with any other person in relation to the merits of such action, or receiving a communication from a party, or other person, in respect to it, without immediately disclosing the same to the court.

7. Conversing with a juror, knowing him to be such, in relation to the merits of any action which he is engaged in the trial of; or supplying any juror with refreshments of any kind, except water, during the time he is engaged in the trial of any cause, without leave of the court.

649 (543). **Other powers.**—Every court has power,—

1. To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings.

2. To enforce order before a person or body empowered to conduct a judicial investigation under its authority.

3. To compel obedience to its judgments, orders and process, and to the orders of a judge out of court, in an action or proceeding therein.

4. To control, in furtherance of justice, the conduct of its officers, and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto.

5. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.

6. To amend and control its process and orders, so as to make them conformable to law and justice.

650 (544). **Punishment for contempt.**—For the effectual exercise of the powers conferred by the preceding section, the court may punish for contempt in the cases provided for in this article.

651 (545). **No records or papers removed from county.** No records or papers of any court must be removed out of the county, except in cases of invasion or insurrection, whereby the same may be endangered, or unless by order of the court.

652 (546). **Reading of minutes.**—The minutes of the court must be read each morning in open court, and, on the adjournment of the court, must be signed by the judge.

Statute directory; failure of judge to sign minutes does not affect the validity of judgments or decrees.—Bartlett v. Lang, 2 Ala. 161; Frazier v. Praytor, 36 Ala. 691.

653 (562). **Papers to be recorded on filing.**—The original pleading in civil suits, at law or in equity, the original process issuing thereon, all affidavits and bonds taken in the course thereof, must be recorded immediately on the filing thereof, or on the return of such process; and the costs of such record are taxable as part of the costs of the cause. If the original pleading, or process, or affidavit, or bond, should be lost, a copy of such record, duly certified, shall stand in the place, and have the force and effect of the original. The original pleading, or the affidavit, or bond, must not be taken from the office of the clerk or register until after the record thereof, and such record forms part of the final record of the cause.

654 (562, 565). **Taking file in pending suit from office.** The file pertaining to a pending suit must not be taken from the office of the clerk, or register, or judge of probate, except by an attorney or solicitor of record of a party to the suit, upon a receipt in writing signed by such attorney or solicitor, stating the number and title of the cause, and the papers contained in the file. If any of such papers are lost or mislaid before a return of the file, and a surrender of the receipt, the costs of substituting them must be paid by such attorney or solicitor.

ARTICLE II.

SUBSTITUTION OF RECORDS LOST OR DESTROYED.

655 (561). **Of record books destroyed.**—If the books of record of any county, or a part thereof, be destroyed by an armed force, or by fire, or by the violence of nature, it is the duty of the court of county commissioners to purchase such blank-books as may be necessary to supply them; and upon the certificate of the court, stating the fact of such destruction, and of the purchase and cost of the necessary books, the auditor must draw a warrant on the treasurer, payable to the judge of probate of the county, for the cost of such books, not exceeding in amount two hundred and fifty dollars, which warrant must be paid out of any funds in the treasury not otherwise appropriated.

656 (555). **Of lost or destroyed court records and papers.** All courts have the inherent power, if original papers or records, pertaining to matters of civil jurisdiction, or to civil cases which are pending, or which have been determined, are lost or destroyed, to cause a substitution thereof, and the substituted paper or record is of equal validity with the original.

McLenden v. Jones, 8 Ala. 298; Doswell v. Stewart, 11 Ala. 629; Adkinson v. Keel, 25 Ala. 551; Bishop v. Hampton, 19 Ala. 792; Pruit v. Pruit, 43 Ala. 73; Shiver v. Shiver, 45 Ala. 349; Lillie v. Larkin, 66 Ala. 110; May v. Parham, 68 Ala. 253; Ward v. State, 76 Ala. 455.

657. Substitution in pending cause or proceeding.—If the cause or proceeding, in which the substitution of a lost or destroyed paper is proposed, be pending and undetermined, the substitution must be made on notice of not less than one day to the adverse party, or his attorney or solicitor of record, if he have such attorney or solicitor, accompanied with a copy of the paper offered in substitution. But if such adverse party, or his attorney or solicitor of record, do not reside in the county, notice may be given by the filing of the paper, and the entry of a motion to substitute, or the filing of such motion, for one day prior to the making thereof. On the hearing of such motion, affidavits and counter affidavits may be received as to the correctness of the proposed substitute.

658 (554, 556). **Substitution, if cause or proceeding be not pending.**—If, after the determination of any civil cause or proceeding, the original papers, or any part thereof, pertaining thereto, which are not of record, are lost or destroyed; or if the record of such papers, with such papers, should be lost or destroyed; or if the record of any judgment or decree, or of any judicial proceeding, or quasi-judicial proceeding, or any part thereof, should be lost or destroyed, any party in interest may, on application in writing, stating the facts, accompanied with the substitute proposed of such lost or destroyed paper or record, verified by affidavit, obtain an order of substitution. If the adverse party be of full age, of sound mind and a resident of the state, notice of the application and a copy thereof, accompanied with a copy of the proposed substitute, must be served on him at least ten days before the term of the court in which such application is made. If he be of unsound mind, or an infant, residing in the state, notice must be served on his guardian, if he have a guardian, or, if he have no guardian,

upon the person with whom he resides, or in whose care or custody he may be. But if such party, whether he be of full age and sound mind, or an infant, or of unsound mind, reside without the state, or his residence be unknown, upon affidavit stating the facts, the register, or the clerk of the court, or the judge of probate, or the justice of the peace must make and enter an order of publication as to such party, and cause notice to be given by publication for three successive weeks in some public newspaper published in the county; or if there be no such newspaper, in a newspaper published in an adjoining county. If the adverse party be of unsound mind, or an infant, the court must appoint a guardian ad litem to represent and defend for him. On the hearing the court may receive affidavits and counter affidavits as to the correctness of the proposed substitute.

659 (558). **Appeal from order granting or refusing substitution.**—From any order of a court of record, granting or refusing substitution under the preceding section, an appeal lies to the supreme court as from final judgments or decrees in civil cases; and bills of exceptions may be taken as in other civil cases. From an order of the justice of the peace, an appeal to the circuit or city court lies, as in other cases, and the trial is de novo.

660. Records of supreme court.—If the records of the supreme court, or any part thereof, be lost or destroyed, the same may be substituted under such rules and regulations as the court may prescribe.

661 (559, 560). **Records of deeds or other instruments lost or destroyed.**—If the record of a deed, contract, conveyance, or other instrument, the record of which is by law required or authorized, be lost or destroyed, the original of such deed, contract, conveyance, or instrument may be recorded again, and such record shall have relation to, and be operative from the day the original record was operative. If the original be lost or destroyed, a copy thereof may be recorded, on proof of its correctness, of the record, and of the loss or destruction of the original; and the record of such copy shall have relation to, and be operative from the day the original record was operative. But in case of the loss or destruction of the original, an application for the record of the copy must be made to the court, or successor of the court, in which the original record was made, and notice thereof given to the party in adverse interest, as is prescribed in section 658 (554, 556).

Box v. Delk, 47 Ala. 729; Tanner v. Mills, 50 Ala. 356; McBryde v. Rhodes, 69 Ala. 133.

662 (557). **Costs of substitution.**—Any proceedings for substitution under any of the provisions of this article, if there be no defense, shall be paid by the party applying for such substitution; if a defense is interposed, by the unsuccessful party; but in no case shall any officer be entitled to any fees in such proceedings, if the loss or destruction of the paper or instrument, sought to be substituted, was caused by his neglect or fault.

ARTICLE III.

PUBLICATION OF LEGAL NOTICES.

663 (3970, 553). **Party in interest may designate newspaper.**—The party in interest, or at whose instance the publication of notice is to be given by advertisement in a newspaper, may designate the newspaper in which such advertisement shall be made. If the officer charged with the duty of making the advertisement disregards such designation, and makes advertisement in some other paper, he must pay the costs thereof, and shall not be entitled to reimbursement.

664 (3972). **Length of publication.**—If the length of the publication be not otherwise prescribed, it must be for three successive weeks.

665 (3974). **Paper sent to officer or person making publication.**—The publisher or manager of the newspaper must send to the officer or person making the advertisement a copy of each issue of the paper containing it.

666 (3975). **Costs of publication.**—Not more than one dollar per square, for the first insertion, and not more than fifty cents per square, for each subsequent insertion of a legal notice or advertisement must be charged or allowed, and the insertions must not be oftener than once a week, unless, in cases of sales under a decree of the court of chancery, the court shall otherwise order.

667 (551). **Agreements between officers and publishers.** All agreements between any officer charged with the duty of advertising legal notices in a newspaper, and the printer, publisher, or manager of such paper, whereby any advantage, gain, or profit is to accrue to such officer, are void; and before the charge for such advertisement can be demanded or received, the officer and the printer, publisher, or manager must each make and file an affidavit that no such agreement exists; and the printer, publisher, or manager must, in addition, make affidavit that the sum charged is the actual, lowest regular price of such advertisement.

668 (547, 548). **Publication, when paper suspended, or discontinued.**—If publication is commenced, or is directed in a particular newspaper, and before it is made or completed there is a suspension or discontinuance of the publishing of such paper, then the publication may be made or completed in some other newspaper published in the county; and if there be no other paper published in the county, the publication may be made or completed by posting notices, for the length of time prescribed, at the court-house door and three other public places in the county; or the publication, if so desired by any party in interest, may be made or completed in some newspaper published in an adjoining county.

669. Notice of sale under power in deed of trust, mortgage, or assignment.—If a deed of trust, mortgage, assignment, or other conveyance to secure the payment of debts, contains a power of sale, and provides that notice of the sale be given in a designated newspaper, or in a newspaper published in the county where the property is situate, or where the sale is to be made, and before the sale is made, the publication of the designated newspaper is suspended, or discontinued, the notice may be given

by advertisement in some other paper published in the county; or if there be no paper published in the county, then, in either case, notice may be given by publication, for the time prescribed, in some newspaper published in an adjoining county, or by posting notices at the court-house door, and three other public places in the county. If the publication of notice has been commenced, and there is a suspension or discontinuance of the publishing of the newspaper in which it is commenced, it may be completed as is herein provided.

670 (566). **Weekly papers taken, and pay for them.**—The clerks of the several circuit courts, the registers in chancery and judges of the several courts of probate, must subscribe for, and take, and file in their respective offices, one copy of each weekly newspaper published in their respective counties, and as soon as practicable, after the end of each year, shall cause the numbers of such papers for the preceding year to be well bound, and shall keep the same safely in their respective offices, as the property of their respective counties; and the court of county commissioners must allow to such officers the sums paid by them for such subscription and binding.

671. (567). **Papers of adjoining county.**—If in any county there be no newspaper published, such officers may take and bind the papers of any adjoining county, in which the public printing and advertising of such county may be done.

672. Newspapers as evidence of notice.—The newspapers containing the advertisement shall be received as evidence of the fact of publication.

CHAPTER 2.

SUPREME COURT AND ITS OFFICERS.

ARTICLE 1.—Supreme court and its justices.
2.—Marshal and librarian, and libraries.
3.—Clerk.
4.—Reporter.

ARTICLE I.

SUPREME COURT AND ITS JUSTICES.

673 (568). **Powers of court vested in three justices.**—The powers of the supreme court are vested in, and its duties performed by a chief justice and two associates justices, who are elected by the qualified electors of the state, and are conservators of the peace throughout the state.

674 (570). **Secretary of chief justice.**—The chief justice may, if he deem it necessary, appoint a secretary to perform such duties as he may prescribe, who, unless removed, shall hold office for the term of office of the chief justice; and his annual salary, payable monthly on the certificate of the chief justice, shall not exceed fifteen hundred dollars.

675 (571). **Jurisdiction of court.**—The supreme court has authority,—

1. To exercise appellate jurisdiction co-extensive with the state, under such restrictions and regulations as are prescribed

by law; but in deciding appeals from the chancery court no weight shall be given the decision of the chancellor upon the facts, but the supreme court shall weigh the evidence, and give judgment as they deem just.*

2. To exercise original jurisdiction in the issue and determination of writs of quo warranto and mandamus, in relation to matters in which no other court has jurisdiction.

3. To issue writs of injunction, habeas corpus, and such other remedial and original writs as are necessary to give to it a general superintendence and control of inferior jurisdictions.

4. To establish rules of practice in such court, and all other courts of record in the state.

5. To direct the transcripts brought up to the court to be made up of a uniform size, and of such form that they can be conveniently bound.

6. To punish for contempts by the infliction of a fine as high as one hundred dollars, and imprisonment not exceeding ten days, one or both.

7. To exercise such other powers, not contrary to the constitution, as are or may be given to such court by law.

Jurisdiction, appellate, not original.—State v. Flinn, Minor, 8; Johnston v. Atwood, 2 Stew. 225; Bell v. Payne, Ib. 413; Ex parte Tarlton, 2 Ala. 35. **Power to issue writs, etc.**—Davis v. Railroad Co., 4 Stew. & Port. 421; Gates v. McDaniel, Ib. 69; State v. Paul, 5 Stew. & Port. 40; John v. State, 1 Ala. 95; State v. Williams, 1 Ala. 342; State v. Porter, Ib. 688; Ex parte Mansony, Ib. 98; Ex parte Tarlton, 2 Ala. 35; Ex parte Chaney, 8 Ala. 427; Ex parte Renfro, Ib. 490; Nugent v. State, 18 Ala. 521; Ex parte Smith, 23 Ala. 94; Ex parte Pickett, 24 Ala. 91; Ex parte City Council, Ib. 98; Ex parte Henry, Ib. 638; Ex parte Elston, 25 Ala. 72; Ex parte Greene, 29 Ala. 52; Ex parte Russell, Ib. 717; Ex parte Echols, 39 Ala. 698; Ex parte Floyd, 40 Ala. 116; Ex parte Henderson, 43 Ala. 392; Ex parte Bibb, 44 Ala. 140; Ex parte Candee, 48 Ala. 386; Ex parte Roundtree, 51 Ala. 42; Ex parte Pearson, 76 Ala. 521.

676 (572). **Issue of writs of injunction and supersedeas.** The justices of the supreme court have each of them authority to issue writs of certiorari, injunction and supersedeas, subject to the limitations prescribed by this Code, as judges of the circuit courts are authorized to grant the same.

677 (573). **Terms of court.**—The regular term of the court shall commence on the first Tuesday in December in each year, and continue, Sundays excepted, until the last day of the next July; but the court may, in its discretion, adjourn from time to time.

678. (573). **Special term.**—The court may, whenever it deems proper, order and hold a special term.

679 (574). **Provision when justices absent.**—One justice, or the marshal of such court, may adjourn the court from day to day, until the sixth day, on which, if a majority of the justices are not present, the court must be adjourned to the next stated term, to which term all cases are continued.

680 (575). **When justices incompetent.**—When all the justices of the supreme court are disqualified from deciding any cause or proceeding pending therein, they must certify the fact of such disqualification to the governor, who must direct a commission to any three persons holding the office of circuit judge or chancellor, to hear and determine such cause or proceeding;

* Rewritten by joint committee.

and the judges so commissioned must hear and determine the same, and their judgment or decree must be entered of record, as other judgments or decrees of the supreme court, and shall have the same force and effect.

681 (576). **When two of the justices disqualified.**—When two of the justices of the supreme court are disqualified to sit in any cause pending in the court, the remaining justice shall certify the fact of such disqualification to the governor, who shall commission two members of the bar of the supreme court; and the persons so appointed, with the justice of the court who is competent to sit, shall compose the supreme court for the trial and decision of such cause, with all the powers, privileges and duties of the supreme court.

Donnell v. Hamilton, 77 Ala. 610.

682 (577). **When one justice incompetent and the others divided in opinion.**—When only one of the justices is disqualified from sitting in any cause or proceeding in the supreme court, the other two must hear such cause, and if they are divided in opinion, they must certify the fact of division to the governor, who must direct a commission to one of the circuit judges or chancellors to hear and determine such cause in connection with the two competent justices of the supreme court; and the circuit judge or chancellor so commissioned, in connection with the two competent or qualified justices, must hear and determine such cause; and the judgment of a majority of them must be entered of record, as other judgments or decrees of the supreme court, and must have the same force and effect.

Goodman v. Walker, 29 Ala. 444; s. c. 38 Ala. 142.

683 (578). **When one justice disqualified and another absent; when justice sitting and appointee differ.**—When one of the justices of the supreme court is disqualified to sit in any cause pending in such court, and one of the other justices is absent from sickness, or any other cause, so that there can be no action by such court, the remaining justice shall certify the fact to the governor, who shall commission a circuit judge or a chancellor, or a member of the bar of the supreme court; and the person so appointed, with the justice present at the court who is qualified, shall compose the supreme court for the trial and decision of such cause. If there be a division of opinion between the members composing such court, they shall certify the fact of such division to the governor, who shall then appoint another circuit judge, chancellor, or member of the bar of the supreme court to sit with them, and hear and determine such cause.

683*a* (579). **Opinion not conclusive upon second appeal; qualification.**—The supreme court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion at that time, is law, without any regard to such former ruling of the law by it; but the right of third persons, acquired on the faith of the former ruling, shall not be defeated or interfered with by or on account of any subsequent ruling.* As amended, Feb. 26, 1887, p. 69.

684 (580). **Salary.**—The annual salary of each justice of the supreme court is thirty-six hundred dollars.

* This section was stricken out by joint committee; but on 26th Feb., 1887, the act noted was passed, and required to be published in Code as section 683*a* (579).

ARTICLE II.

MARSHAL AND LIBRARIAN, AND LIBRARIES.

685. (581). **Marshal; appointment; term of office; duties.** A marshal of the supreme court must be appointed by the justices thereof, and may at any time be removed by them, and shall discharge such duties and obey such directions, not inconsistent with the laws of the state, and pertaining to his office, as may be required by the justices.

March 1, 1881, p. 13, sec. 1.

686. Assistant marshal and librarian.—The marshal and librarian is authorized to employ an assistant during the sittings of the supreme court, and during the sessions of the general assembly.

Ib sec. 2.

687. Compensation of assistant.—The compensation of such assistant is one dollar and fifty cents for each day of actual service, not to exceed in the aggregate three hundred dollars per annum, and is payable monthly, on the certificate of the marshal and librarian to the auditor, who is authorized to draw a warrant on the treasury for its payment.

688 (582). **Marshal is librarian.**—The library of the state, and the supreme court library are under the charge of the marshal, who shall be librarian of the supreme court library, and of the state library, and shall, in discharging the duties of his office, obey such rules and regulations as may be prescribed by the justices.

689 (583). **Justices make rules as to library.**—The justices of the supreme court must make such rules as they may deem necessary for the preservation and protection of the libraries.

690 (584). **Entry of appointment; oath.**—The appointment of the marshal must be entered on the minutes of the court, and before receiving any compensation, he must make oath before one of the justices, that he will faithfully discharge his duties as marshal and librarian, and that he will, to the best of his ability, preserve the libraries from loss and injury.

691 (585). **Bond.**—Such marshal shall enter into bond, with good surety, payable to the State of Alabama, in the sum of one thousand dollars, to be approved by one of the justices of the supreme court, and conditioned that he will discharge all the duties which are, or may be required of him by law.

692 (586). **Salary.**—The annual salary of the marshal and librarian is fifteen hundred dollars.

Riggs v. Brewer, 64 Ala. 282.

As amended, March 1, 1881, p. 62, sec. 2.

693 (587, 603). **Library fund.**—The sum of five hundred dollars, annually, is appropriated for the use and benefit of the library of the supreme court, to be drawn by the warrant of the auditor, on the application of the chief justice, on the treasury, and expended under the direction of the justices. The money arising from the sales made by the secretary of state of the reports of the supreme court remaining, in his office on the first day of March, 1881, must be paid to the librarian, and, under the direction of the justices, applied to the use and benefit of the library. The surplus proceeds of the sales of such reports as have been, or may be published under contract made by the governor, remaining after paying the expenses of binding and printing, must also be paid to the librarian, and be expended by him under the direction of the justices.

694. Library tax.—For the maintenance of the supreme court library, there shall be taxed, as costs, the sum of six dollars on each appeal decided by the supreme court, which must, by the clerk, be taxed as other costs, and paid to the librarian, by whom it must be disbursed on the order of the justices. Feb. 23, 1883, p. 149.

ARTICLE III.

THE CLERK.

695 (588). **Appointment and removal.**—A clerk of the supreme court is appointed by the justices, and holds his office during the term of the justices making the appointment, removable at any time for cause, to be determined by the court, and entered at length on its record.

696 (589). **Bond.**—Before entering on the duties of his office, he must give bond with good surety in the sum of five thousand dollars, to be approved by the chief justice, and recorded in the office of the secretary of state.

697 (590). **Additional bond.**—He must give additional bond, on the requisition of the chief justice, to be made whenever the public interest requires, and failing so to do within the time fixed by the chief justice, his office is vacated.

698 (591). **Office and office hours.**—He must keep his office in the capitol, open for the transaction of business on every day except Sunday and legal holidays, from nine in the morning until four in the afternoon.

699 (592). **Duties.**—He has authority to administer oaths, and take affidavits; and it is his duty,—

1. To issue and sign all writs and process of every description, issued under the authority of the court.

2. To keep in regular order the papers, dockets and records of such court.

3. To keep an appearance, trial, motion and execution docket, under such rules as are prescribed by the court.

4. To enter from day to day the judgments and proceedings of the court.

5. To send, immediately after the expiration of the time for hearing causes, allotted by the supreme court to each of the several divisions into which its business is distributed, to the clerks and registers of the courts below, certificates of the affirmance or reversal of the cases decided belonging to the division, the period of which has expired; but if the court should grant a rehearing in any cause, after the certificate has been so sent down, the clerk must certify that fact to the clerk or register of the court below, and such certificate shall operate as a supersedeas of any execution which may have issued on a certificate of affirmance, without impairing the obligation of the sureties to the appeal bond.

6. Within twenty days after the reversal of any judgment or decree, or on the affirmance of any interlocutory order or decree, to send to the court below a certified copy of the opinion of the supreme court; and such opinion and certificate shall be legal evidence in any cause in any court.

7. At the end of each term, to have the transcripts of the records of all cases, with a copy of the orders made, and of the final

judgment in each case, decided at such term, bound in strong binding, and lettered so as to show the term at which the decisions were made.

8. Immediately on the expiration of thirty days after the decision of each case, to deliver to the reporter the record of the case and opinion of the court, taking his receipt therefor. But whenever an application for a rehearing in any case is pending, he shall deliver such record and opinion, and take such receipt immediately on the determination of such application; and when such records shall be returned by the reporter, he shall have them bound.

700 (593). **Record; what constitutes.**—Such transcript and copy of orders and of final judgment constitute the record in each case.

701 (594). **Pay for binding.**—When any of the records are bound according to the provisions of this article, the account for the same, approved by any two of the justices, must be paid out of the state treasury, on the warrant of the auditor.

702 (595). **Books, blanks and stationery furnished.**—The record books, blanks and stationery, necessary to the office, shall be furnished to the clerk in like manner as it is furnished to the other public offices in the capitol.

ARTICLE IV.

THE REPORTER AND REPORTS.

703 (596). **Appointment of reporter.**—The justices of the supreme court must, from time to time, appoint a reporter of the decisions of the court, who shall receive the records of cases and opinions of the court from the clerk, and, immediately after he has reported any case, shall return to the clerk the record and opinion in such case for binding, taking his receipt therefor.

Feb. 13, 1879, p. 153, sec. 1.

704. Of assistant reporters.—Whenever the reporter shall have in his hands unreported a sufficient number of records to make one volume of reports, the court shall appoint an assistant reporter or reporters, whose compensation shall be paid by warrant on the treasury, drawn by the auditor on the certificate of the chief justice.

705 (592, 597). **Synopsis of decisions published.**—The reporter must publish weekly, during the sittings of the court, in such newspaper published in the city of Montgomery as he may select, a synopsis of all cases decided by the court during the week preceding publication, if such publication can be made without charge.

Ib. sec. 2.

706. Compensation of reporter.—The reporter is entitled to nine hundred dollars for each volume of reports reported and published by him, payable on the warrant of the chief justice drawn on the treasurer; but the chief justice may, from time to time, in his descretion, authorize payments to be made to the reporter on account, and draw warrants therefor, not exceeding two-thirds the proportionate value of the work the reporter may have done on such volume at the time of drawing such warrant or warrants.

Ib. sec. 1.

707. Time within which reports to be published.—The opinions of the supreme court must be published within six

months after the determination of the cause in which an opinion is delivered, unless longer delay is necessary to accumulate a sufficient number of opinions to make a volume of reports.

708 (600). **What reports shall contain.**—The justices of the supreme court may direct the omission of all decisions merely re-affirming previous decisions, except that the title of such cases shall be published, with brief notes of the points decided, including reference to the cases so re-affirmed; and such cases, so reported, shall be placed in the table of cases reported in full; and it is the duty of the reporter to abridge and condense all briefs or arguments of counsel, which may be published in the reports, reducing them to a mere abstract of the points made, and the authorities cited. The name of the judge or chancellor who presided below must be published.

709 (601). **Governor may contract for printing reports.** If the justices cannot contract for the publication of the decisions, the governor is required to contract for the printing and binding of the same; and for the purpose of paying the contract price, he may draw his order or certificate to the contractor, which must be paid by warrant of the auditor; but the price to be paid for each volume must not exceed two thousand five hundred dollars.*

710 (602). **Proprietorship and custody of reports.**—The state shall have the proprietorship of the volumes of the reports when published by the governor; and, when delivered, they must be taken charge of by the secretary of state, who must retain of each volume two hundred copies, to be distributed as required by law, and the remainder must be sold at the price of five dollars per copy.

711 (604). **Distribution of reports.** — Of the two hundred volumes received for the use of the state, there must be distributed to the governor, each judge of any court of record (except county commissioners), chancellors, attorney-general, solicitors, and president of the University of Alabama for the use of the law department, one copy each, which must be delivered to their successors, respectively, or returned to the secretary of state; four copies must also be furnished each house of the general assembly.

712 (605). **Copies sent to other states.**—The secretary of state must turn over to the state librarian, who must transmit to the executive of each state and territory of the United States, a copy of each volume of the reports, as published, with a request that if such state or territory publishes its judicial decisions, it would in turn transmit a copy, which, if received, must be placed in the library of the supreme court.

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* The joint committee made the printing of the reports a part of the public printing (§ 207), and struck out section 598 of Code of 1876, but failed to omit this section.

CHAPTER 3.

CHANCERY DIVISIONS AND DISTRICTS; COURTS OF CHANCERY; CHANCELLORS AND REGISTERS.

ARTICLE 1.—Chancery divisions and districts; times and places of holding court.

2.—Chancery court and its jurisdiction; chancellors and their powers; other provisions relating to such courts and to chancellors.

3.—Registers of the chancery court, their qualification, duties and powers; other provisions relating to their office.

ARTICLE I.

CHANCERY DIVISIONS AND DISTRICTS; TIMES AND PLACES OF HOLDING COURT.*

Feb. 28, 1887, p. 134, sec. 1.

713. Four chancery divisions.—The State of Alabama is divided into four chancery divisions, to be named and composed of the following counties, to-wit:

The Northeastern division, to be composed of the counties of Marshall, DeKalb, Cherokee, Etowah, St. Clair, Calhoun, Cleburne, Randolph, Clay, Talladega, Shelby, Chilton, Coosa, Tallapoosa, Chambers, Lee [and] Elmore.

The Northwestern division, [to be composed of the counties of] Jackson, Madison, Limestone, Lauderdale, Colbert, Franklin, Lawrence, Morgan, Cullman, Winston, Marion, Lamar, Fayette, Walker, Blount, Jefferson [and] Tuskaloosa.

The Southeastern division, [to be composed of the counties of] Russell, Barbour, Henry, Geneva, Dale, Coffee, Pike, Bullock, Macon, Montgomery, Lowndes, Crenshaw, Butler, Conecuh, Covington [and] Escambia.

The Southwestern division, [to be composed of the counties of] Mobile, Baldwin, Monroe, Wilcox, Dallas, Autauga, Perry, Bibb, Hale, Pickens, Greene, Sumter, Marengo, Choctaw, Clarke and Washington.†

Ib. sec. 3.

714. Northeastern division; times and places of holding court.—The chancery courts in the northeastern chancery division shall, on and after the first day of July, 1887, be held at the following times and places:

In the first district, composed of the county of Chambers, at LaFayette, on the first Wednesday after the second Monday in January and July, and shall continue four days.

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* The act of February 28th, 1887, *supra*, necessarily repealed the prior statutes then of force, dividing the state into chancery divisions, and fixing times and places for holding court, which were incorporated into this Code as reported to, and adopted by the general assembly; and hence, the commissioner feels justified in substituting the provisions of said act in lieu of the article on the same subject contained in the Code as adopted.

† By the second section of the act, "To divide the State of Alabama into four chancery divisions," approved February 28th, 1877 (Pamph. Acts, 1886–7, p. 134), it is provided: "That the provisions of this act shall take effect from and after the appointment and qualifications of a chancellor in the division in which a chancellor does not now reside; *Provided, however*, That at the general election in August, 1892, a chancellor shall be elected for each of the divisions aforesaid, by the qualified electors thereof, who shall hold his office for the term of six years from and after Tuesday after the first Monday in November, 1892, and until his successor is elected and qualified, and who must have resided in the division for which he was elected for twelve months preceding such election, and during his continuance in office."

In the second district, composed of the county of Lee, at Opelika, on Thursday before the first Monday in March and September, and may continue nine days.

In the third district, composed of the county of Tallapoosa, at Dadeville, on the first Thursday after the fourth Monday in January and July, and continue three days.

In the fourth district, composed of the county of Coosa, at Rockford, on the first Monday after the fourth Monday in January and July, and continue three days.

In the fifth district, composed of the county of Talladega, on the second Monday in March and September, and continue six days.

In the sixth district, composed of the county of Shelby, at Columbiana, on the third Monday in March and September, and continue three days.

In the seventh district, composed of the county of Chilton, at Clanton, on the first Thursday after the third Monday in March and September, and continue three days.

In the eighth district, composed of the county of Elmore, at Wetumpka, on the fourth Monday in March and September, and continue three days.

In the ninth district, composed of the county of Calhoun, on the third Monday in April and October, and continue three days.

In the tenth district, composed of the county of Cleburne, at Edwardsville, on the first Thursday after the third Monday in April and October, and continue three days.

In the eleventh district, composed of the county of Randolph, at Wedowee, on the fourth Monday in April and October, and continue three days.

In the twelfth district, composed of the county of Clay, at Ashland, on the first Thursday after the fourth Monday in April and October, and continue three days.

In the thirteenth district, composed of the county of DeKalb, at Fort Payne, on the second Monday in May and November, and continue three days.

In the fourteenth district, composed of the county of St. Clair, at Ashville, on the first Thurdsay after the second Monday in May and November, and continue three days.

In the fifteenth district, composed of the county of Etowah, at Gadsden, on the third Monday in May and November, and continue six days.

In the sixteenth district, composed of Marshall county, at Guntersville, on the fourth Monday in May and November, and continue three days.

In the seventeenth district, composed of the county of Cherokee, at Centre, on the first Monday in April and October, and may continue four days.

715. Northwestern division; times and places of holding court.—The chancery courts in the northwestern chancery division shall, on and after the first day of July, 1887, be held at the following times and places: Ib. sec. 4.

In the first district, composed of the county of Franklin, at the court-house of said county, on the third Monday in February and August, and may continue three days.

In the second district, composed of the county of Colbert, at

Tuscumbia, on Thursday after the third Monday in February and August, and may continue three days.

In the third district, composed of the county of Lauderdale, at the court-house at Florence, on the fourth Monday in February and August, and may continue three days.

In the fourth district, composed of the county of Lawrence, at the court-house at Moulton, on Thursday after the fourth Monday in February and August, and may continue three days.

In the fifth district, composed of the county of Limestone, at the court-house at Athens, on the first Monday after the fourth Monday in February and August, and may continue three days.

In the sixth district, composed of the county of Morgan, at the court-house of said county, on the first Thursday after the first Monday after the fourth Monday in February and August, and may continue three days.

In the seventh district, composed of the county of Blount, at the court-house at Blountsville, on the fourth Monday in May and November, and may continue three days, so that the chancery court of Blount county shall be held on above Mondays.

In the eighth district, composed of the county of Madison, at Huntsville, on the third Monday after the fourth Monday in February and August, and may continue two weeks.

In the ninth district, composed of the county of Jackson, at Scottsboro, on the fifth Monday after the fourth Monday in February and August, and may continue three days.

In the tenth district, composed of the county of Tuskaloosa, at the court-house in Tuskaloosa, on the tenth Monday after the fourth Monday in February and August, and may continue three days.

In the eleventh district, composed of the county of Lamar, at the court-house at Vernon, on the seventh Monday after the fourth Monday in February and August, and may continue three days.

In the twelfth district, composed of the county of Marion, at the court-house at Hamilton, on Thursday after the seventh Monday after the fourth Monday in February and August, and may continue three days.

In the thirteenth district, composed of the county of Fayette, at the court-house at Fayetteville, on the eighth Monday after the fourth Monday in February and August, and may continue three days.

In the fourteenth district, composed of the county of Walker, at the court-house at Jasper, on Thursday after the eighth Monday after the fourth Monday in February and August, and may continue three days.

In the fifteenth district, composed of the counties of Cullman and Winston, at the court-house of Cullman county, at Cullman, on the ninth Monday after the fourth Monday in February and August, and may continue four days.

In the sixteenth district, composed of the county of Jefferson, at the court-house in the city of Birmingham, on the eleventh Monday after the fourth Monday in February and August, and may continue until the business is disposed of.

Ib. sec. 5. **716. Southeastern division; times and places of holding court.**—The chancery courts in the southeastern chancery di-

vision shall, on and after the first day of July, 1887, be held at the following times and places:

In the first district, composed of the county of Escambia, at Brewton, on the first Monday of January and July, and may continue three days.

In the second district, composed of the county of Conecuh, at Evergreen, on the Thursdays after the first Monday in January and July, and may continue three days.

In the third district, composed of the county of Butler, at Greenville, on the second Monday in January and July, and may continue one week.

In the fourth district, composed of the counties of Crenshaw and Covington, at Rutledge, on the Thursday after the third Monday in January and July, and may continue three days.

In the fifth district, composed of the county of Lowndes, at Hayneville, on the fourth Monday of January and July, and may continue one week.

In the sixth district, composed of the county of Montgomery, at Montgomery, on the second Monday after the fourth Monday in March and September, and may continue three weeks.

In the seventh district, composed of the county of Macon, at Tuskegee, on the fourth Monday after the fourth Monday in January and July, and may continue one week.

In the eighth district, composed of the county of Russell, at Seale, on the first Monday of March and September, and may continue three days.

In the ninth district, composed of the county of Bullock, at Union Springs, on the Thursday after the first Monday in March and September, and may continue three days.

In the tenth district, composed of the county of Pike, at Troy, on the second Monday in March and September, and may continue one week.

In the eleventh district, composed of the county of Coffee, at Elba, on the third Monday in March and September, and may continue three days.

In the twelfth district, composed of the county of Dale, at Ozark, on the Thursday after the third Monday in March and September, and [may] continue three days.

In the thirteenth district, composed of the county of Henry, at Abbeville, on the fourth Monday of March and September, and may continue three days.

In the fourteenth district, composed of the county of Barbour, at Eufaula, on the first Monday after the fourth Monday in March and September, and may continue one week.

717. Southwestern division; times and places of holding court.—The chancery courts in the southwestern chancery division shall, after the first day of July, 1887, be held at the following times and places: Id., sec. 6.

In the first district, composed of the county of Pickens, at Carrollton, on the first Wednesday of February and September, and may continue four days.

In the second district, composed of the county of Greene, at Eutaw, on the first Monday after the first Wednesday in February and September, and may continue one week.

In the third district, composed of the county of Hale, at

Greensboro, on the second Monday after the first Wednesday of February and September, and may continue one week.

In the fourth district, composed of the county of Perry, at Marion, on the third Monday after the first Wednesday in February and September, and may continue one week.

In the fifth district, composed of the county of Bibb, at Centreville, on the fourth Monday after the first Wednesday in February and September, and may continue three days.

In the sixth district, composed of the county of Autauga, at Prattville, on Thursday after the fourth Monday after the first Wednesday in February and September, and may continue three days.

In the seventh district, composed of the county of Dallas, at Selma, on the second Mondays of March and October, and may continue one week.

In the eighth district, composed of the county of Marengo, at Linden, on the third Monday in March and October, and may continue one week.

In the ninth district, composed of the county of Sumter, at Livingston, on the fourth Monday of March and October, and may continue one week.

In the tenth district, composed of the county of Choctaw, at Butler, on the first Monday in April and November, and may continue three days.

In the eleventh district, composed of the county of Monroe, at Claiborne, on Thursday after the first Monday in April and November, and may continue three days.

In the twelfth district, composed of the county of Wilcox, at Camden, on the second Monday in April and November, and may continue three days.

In the thirteenth district, composed of the county of Clarke, at Grove Hill, on Thursday after the second Monday in April and November, and may continue three days.

In the fourteenth district, composed of the counties of Mobile, Baldwin and Washington, at Mobile, on the third Monday in April and November, and may continue three weeks.

718 (613). **Special terms.**—Special terms of any chancery court may be held, at the place of holding the regular term, when any regular term is not held, or when the business is not disposed of at any regular term.

719 (614). **Notice of such terms.**—Thirty days' notice of the time of holding such special terms must be given by advertisement in some newspaper published in the county, or if none is published therein, in the one published nearest to the county in which such special term is to be held.

ARTICLE II.

CHANCERY COURT AND ITS JURISDICTION; CHANCELLORS AND THEIR POWERS; OTHER PROVISIONS RELATING TO SUCH COURT AND TO CHANCELLORS.

720 (616). **Jurisdiction of chancery court.**—The powers and jurisdiction of courts of chancery extend,—

1. To all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals.

2. To all cases founded on a gambling consideration, so far as to sustain a bill of discovery, and grant relief.

Paulling v. Watson, 26 Ala. 205.

3. To subject an equitable title or claim to real estate to the payment of debts.

4. To such other cases as may be provided by law.

Waldron v. Simmons, 28 Ala. 630.

721 (617). **Extraordinary jurisdiction of chancellors.** Chancellors may exercise the extraordinary jurisdiction granted to such officer by the common law, in cases of necessity, when adequate provision has not been made for its exercise by some other officer, or in other courts, and with the exceptions, limitations and additions imposed by the laws of this state.

722 (620). **Powers to enforce execution of process.**—Courts of chancery have all the powers of enforcing the execution of process which appertain to chancery courts; and chancellors may, when necessary, appoint a special officer to execute process against any sheriff or coroner, or to perform any other special service.

723 (618). **Power to punish for contempts.**—The court of chancery may punish for contempts by fine, not exceeding fifty dollars, and by imprisonment, not exceeding five days; one or both.

724 (619). **Power to administer oaths.**—Chancellors may administer oaths and take affidavits in all cases in which oaths and affidavits are required by law.

725 (615). **Residence and salary of chancellors.** — Each chancellor shall, at the time of his election or appointment, and during his continuance in office, reside in the division for which he is elected or appointed; and his salary shall be twenty-two hundred and fifty dollars per annum. *

726 (621). **Chancellor's jurisdiction; courts, where held.** Each chancellor has jurisdiction co-extensive with the state; but he must hold the courts in his division, or provide for their being held by some other chancellor.

727 (622). **When court to be opened.**—When the period for any term of the chancery court is three or more days, if the chancellor is absent, the sheriff must adjourn the court from day to day until three o'clock in the afternoon of the third day; and at any time before that hour the chancellor may open the court.

728 (623). **Penalty for failure to attend, or absence.**—Any chancellor who fails to attend any court at the appointed time, unless the same is held by another chancellor, or who, after attending, absents himself before the term closes, or the completion of the business of the court, forfeits, for each day's absence or failure to attend, twenty-five dollars, to be deducted from his salary, unless such failure or absence was necessary on account of the sickness of himself or family, or unless there has been a failure to hold court, or an adjournment of the same, on account of an epidemic or contagious disease, or well-grounded

* After January 1, 1888, salary fixed at $2,500 per annum. Pamph. Acts, 1886-7, p. 134.

apprehension thereof; either of which facts may be proved by his own affidavit, to be produced to the auditor and filed in his office.

729 (624). **Register certifies such failure or absence.**—The register of the court from which the chancellor may be absent, or which he fails to attend, as described in the preceding section, must, immediately after the end of the term, certify the number of days of such absence or failure to attend to the auditor.

730 (625). **Penalty for register's failure to certify; when not required to certify.**—Any register, failing for thirty days to certify, as required in the preceding section, incurs a penalty to the state of one hundred and fifty dollars, to be recovered after two days' notice, on motion, in the name of the state, by the solicitor, in the circuit court of the county in which such register resides; but the chancellor incurs no forfeiture, and the register must not certify to the auditor, in case of absence for a day at the commencement of a term, if there was not time, after the adjournment of the preceding court, to reach the place of holding court on the first day of the term, or if the chancellor was prevented from reaching the place of holding the court on the first day by high water, or if he could only have reached such place at such time by traveling on Sunday, or if his absence was not attributable to a willful neglect of duty.

731 (627). **Compensation to solicitor acting as special chancellor.**—Any solicitor acting as special chancellor on the hearing and trial of any cause, which the chancellor is incompetent to try, shall receive for his compensation an amount to be agreed upon, and to be paid as may be determined by the solicitors in the cause.

ARTICLE III.

REGISTERS OF THE CHANCERY COURT, THEIR QUALIFICATION, DUTIES AND POWERS; OTHER PROVISIONS RELATING TO THEIR OFFICE.

As amended, Feb. 13, 1879, p. 50.

732 (629). **Appointment, term and removal of register.** A register in chancery for each district is appointed by the chancellor of the division in which such district is situate, who holds the office during the term of the chancellor making the appointment; but the chancellor may, in term time or vacation, remove any such register for ineligibility or disqualification, whether existing at the time of the appointment or thereafter occurring, or for misbehavior, negligence, or malpractice; and, in case of any removal, the reasons therefor must be entered upon the minutes at the term at which the removal is made, or, if in vacation, at the first term thereafter.

733 (630). **Official bond of register.**—The register, before entering upon the discharge of the duties of his office, must give bond in such sum as may be required by the chancellor, or by the judge of probate of the county in which the court is held, not less than five thousand dollars, to be approved by the chancellor, or such judge of probate; and such bond must be filed and recorded in the office of the judge of probate of the county in which the court of which he is register is held.

734 (631, 632). **Additional bond.**—The chancellor, whenever the public interests demand, must require of such register an additional bond; and, on failure to give the same within the time fixed by the chancellor therefor, the chancellor must remove him from office. Such additional bond must be approved, filed and recorded as the first official bond.

735 (633). **Place of office.**—The register must keep his office at the place at which the court of which he is register is held.

736 (634). **Duties of register.**—It is the duty of the registers within their respective districts,—

1. To administer oaths in chancery cases, and to issue all process from such courts; to make orders of publication for defendants; to grant decrees pro confesso for the want of answers; to hear exceptions to bills, answers and reports; to issue attachments and process of sequestration; to perform the duties of master, unless otherwise ordered by the chancellor; and to make all interlocutory decrees and orders in vacation, not affecting the decision of the controversy between the parties, subject at all times to the control, direction and supervision of the chancellor.

Powell v. Central Plank Road Co., 24 Ala. 441.

2. To keep a docket, in which must be entered the names of plaintiffs and defendants, the names of the solicitors of the several parties, a minute of the time when process issued and was returned; the return thereon, and a note of all the orders and proceedings.

3. To keep an execution docket as required of clerks of the circuit court; and in such docket, as well as on the execution, to enter the name of the solicitor of the party entitled to the execution.

4. To keep a subpœna docket, in which must be entered the cases in which subpœnas for witnesses examined orally in open court, or before him on references, or otherwise, are issued, the names of the witnesses, the time of the issue, and the return of the sheriff.

5. To keep a commission docket, in which shall be entered the date of filing interrogatories, direct, cross and rebutting, the names of the witnesses for the examination of whom the commission issues, for what party the witnesses are examined, the date of the issue and return of the commission, the names of the commissioners, the residences of witnesses and commissioners, and the fees for copying interrogatories, issuing notices and commissions, and the fees of the witnesses and of the commissioners.

6. To enter, in well-bound books, all orders and interlocutory decrees made by him in vacation, and all decrees and orders made by the chancellor.

7. To record, in well-bound books, within six months after the final determination of any cause, all the proceedings in relation to the same, except those previously recorded under section 653 (562), and except as otherwise directed in this article.

8. To issue, within five days after the adjournment of each term of the court, all process necessary for the enforcement of any order or decree made during the term.

9. To keep all papers, books, dockets and records belonging

to his office with care and security; the papers filed, arranged, numbered and labeled so as to be of easy reference; the books, dockets and records properly labeled; and to allow parties to inspect the same free of charge.

10. On application, and the payment of the legal fees therefor, to make out and deliver to any person a correct transcript, properly certified, of any paper or record in his office.

11. To give the plaintiff, his agent, or solicitor, if resident in the county, personal notice of the collection of money within ten days thereafter; if not resident in the county, and he knows the residence of either of them, he must send such notice by mail.*

12. To perform such other duties as are, or may be required of him by law.

737 (637). **Depositions, etc., not recorded; transcript for supreme court.**—In no case must the register make any record of any commission issued to take the deposition of any witness, or the direct, cross, or rebutting interrogatories, or the exhibits thereto, or the answers to such interrogatories; but the register must mark, file and carefully preserve all papers relating to any case decided in chancery; and whenever a case is carried to the supreme court the register must make out a transcript from the complete record and the papers on file in his court relating to the case.

Cargile v. Ragan, 65 Ala. 287.

738 (641). **Injunctions.**—The register has no authority to grant or dissolve injunctions.

739 (642). **Special register.**—The chancellor may appoint a special register when necessary.

740 (643). **Sheriff, officer of court.**—The sheriff of the county in which the court sits is the officer to attend upon it, maintain order, and obey the orders of the chancellor relating to its business; and all sheriffs must execute and return all process from the court of chancery, directed to any sheriff, and placed in their hands to be executed.

741 (644). **Books and stationery.**—The courts of county commissioners must allow to the registers in chancery the amounts properly expended by them for books and stationery, for the use of their offices.

742 (645). **How such expenses paid, when more than one county in district.**—When a district is composed of more than one county, the amounts expended for such books and stationery shall be borne equally by the respective counties forming the district; and the chancellor must, once a year during the sitting of the court, ascertain the share each county in such district is liable to contribute, and certify the same to the court of county commissioners of such county; and such court must provide for the payment of the same according to the certificate of the chancellor.

743 (646). **General direct and reverse indexes.**—Registers in chancery must keep general direct and reverse indexes of all

* By act approved February 5, 1887 (Pamph. Acts, 1886-7, p. 124), the register, when holding a reference by order of the chancery court, or sitting at rules in any matter which by law may come before him, may punish for contempt, by fine, not exceeding ten dollars, and by imprisonment, not exceeding two days.

record books in their offices, which must always be in good, and substantial, and well-bound books; but they are not required to prepare any new indexes, if those already in their offices are sufficient.

744 (647). **Recopy of books.**—The register, deeming it necessary to recopy any books in his office, in order to secure their contents from damage or loss, must submit the same to the examination of the court of county commissioners, and such court, if they deem such recopy necessary, must, upon the minutes of the court, order the same to be made; and the register must make the same in good and substantial books, for which such court must allow him a reasonable compensation; and if more than one county are embraced in the district, the expenses therefor must be borne equally by such counties, to be paid as the expenses for books and stationery are paid.

745 (648). **Records free for examination.**—The records of the register's office must be free for the examination of all persons when not in use by him.

746 (649). **Register pays money to successor.**—The register, having in his hands at the expiration of his official term, any money held by him subject to the further order, decree, or judgment of any court, shall, on demand of his successor in office, pay the same to him, and, upon such payment, shall be discharged from further liability therefor.

747. Register not allowed to practice in his court.—It is unlawful for any register to practice law in the court of which he is register, or to be interested, as solicitor, in any cause pending in such court, while he is in office. Feb. 14, 1885, p. 119.

CHAPTER 4.

JUDICIAL CIRCUITS; CIRCUIT COURTS; JUDGES AND CLERKS.

ARTICLE 1.—Judicial circuits, and times and places of holding court.
2.—Circuit court and its jurisdiction; judges and their powers; other provisions relating to such court and judges.
3.—Clerks of the circuit court, their qualification, duties and powers; other provisions relating to their office.

ARTICLE I.

JUDICIAL CIRCUITS, AND TIMES AND PLACES OF HOLDING COURT.

748. Division of state into nine circuits.—The state is divided into nine judicial circuits, each circuit to be numbered, and composed of the counties as follows: Feb. 17, 1885, p. 147, sec. 1.

First circuit—Choctaw, Washington, Clarke, Monroe, Marengo, Baldwin and Mobile.

Second circuit—Covington, Crenshaw, Escambia, Conecuh, Pike, Butler and Montgomery.

Third circuit—Henry, Dale, Geneva, Coffee, Bullock, Russell, Lee and Barbour.

Fourth circuit—Dallas, Perry, Hale, Lowndes and Wilcox.

Fifth circuit—Randolph, Chambers, Tallapoosa, Coosa, Macon, Chilton, Bibb, Elmore and Autauga.

Sixth circuit—Winston, Walker, Fayette, Lamar, Pickens, Greene, Sumter, and Tuskaloosa.

Seventh circuit—Talladega, Clay, Cleburne, Calhoun, St. Clair, Shelby and Jefferson.

Eighth circuit—Lauderdale, Colbert, Marion, Franklin, Cullman, Lawrence, Morgan, Limestone and Madison.

Ninth circuit—Etowah, Blount, Marshall, DeKalb, Cherokee and Jackson.

Ib. sec. 3

749. Times and places of holding courts.—The circuit courts in the several counties shall be held at the court-houses thereof, in each year, as follows:*

IN THE FIRST CIRCUIT.

1. In the county of Marengo, on the first Monday in March, and on the fourth Monday in September, and, at each term, may continue three weeks.†

2. In the county of Choctaw, on the fourth Monday in March, and the third Monday after the fourth Monday in September, and, at each term, may continue two weeks.

3. In the county of Washington, on the second Monday after the fourth Monday in March, and the fifth Monday after the fourth Monday in September, and, at each term, may continue one week.

4. In the county of Clarke, on the third Monday after the fourth Monday in March, and the sixth Monday after the fourth Monday in September, and, at each term, may continue one week.

5. In the county of Monroe, on the fourth Monday after the fourth Monday in March, and may continue one week; and on the seventh Monday after the fourth Monday in September, and may continue two weeks.

6. In the county of Baldwin, on the fifth Monday after the fourth Monday in March, and on the ninth Monday after the fourth Monday in September, and may, at each term, continue two weeks.

7. In the county of Mobile, on the seventh Monday after the fourth Monday in March, and on the eleventh Monday after the fourth Monday in September, and, at each term, may continue eight weeks.

IN THE SECOND CIRCUIT.

Ib. sec. 3, as amended Dec. 10, 1886, p. 123.

1. In the county of Covington, on the first Monday in March, and may continue two weeks; and on the first Monday in September, and may continue one week; the criminal docket to be taken up on Wednesday of the first week.

2. In the county of Crenshaw, on the third Monday in March, and may continue one week; and on the second Monday in

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* The changes in the times and places of holding circuit courts, made by acts passed at the last session of the general assembly, as noted in the margin, have been substituted by the commissioner in lieu of the provisions of this Code, as adopted, in conflict therewith.

† By act approved February 5, 1887 (Pamph. Acts 1886-7, p. 189), it is provided that "the criminal docket of Marengo county shall be taken up on Monday of the second week of the term provided by law."

September, and may continue two weeks; the criminal docket to be taken up on Wednesday of the first week.*

3. In the county of Escambia, on the fourth Monday in March, and may continue one week; and on the fourth Monday in September, and may continue two weeks.

4. In the county of Conecuh, on the first Monday after the fourth Monday in March, and on the second Monday after the fourth Monday in September, and, at each term, may continue two weeks.

5. In the county of Pike, on the fourth Mondays after the fourth Mondays in March and September, and, at each term, may continue three weeks.

6. In the county of Butler, on the seventh Mondays after the fourth Mondays in March and September, and, at each term, may continue three weeks.

7. In the county of Montgomery, on the second Mondays in June and January, and, at each term, may continue until the business is disposed of.

IN THE THIRD CIRCUIT. Ib. sec. 3.

1. In the county of Bullock, at Union Springs, on the second Monday in February, and on the second Monday in August, and, at each term, may continue two weeks. As amended, Dec. 11, 1886, p. 189.

2. In the county of Henry, at Abbeville, on the third Monday after the first Monday in February, and on the third Monday after the second Monday in August in each year, and may continue one week.

In the county of Henry, at Columbia, on the fourth Monday after the first Monday in February, and on the fourth Monday after the second Monday in August in each year, and may continue one week.

3. In the county of Dale, at Ozark, on the second Mondays in January and July, and, at each term, may continue one week. As amended, Dec. 11, 1886, p. 189.

4. In the county of Geneva, on the sixth Monday after the first Monday in February, and on the sixth Monday after the second Monday in August, and, at each term, may continue one week.

5. In the county of Coffee, on the seventh Monday after the first Monday in February, and on the seventh Monday after the second Monday in August, and, at each term, may continue one week.

6. In the county of Lee, on the twelfth Monday after the first Monday in February, and on the twelfth Monday after the second Monday in August, and, at each term, may continue three weeks. As amended, Feb. 28, 1887, p. 211.

7. In the county of Russell, on the ninth Monday after the first Monday in February, and on the ninth Monday after the second Monday in August, and, at each term, may continue three weeks. Ib.

8. In the county of Barbour, at Clayton, on the fifteenth Monday after the first Monday in February, and on the fifteenth

* By act approved February 24, 1887 (Pamph. Acts 1886–7, p. 201), it is provided that "the criminal docket shall be taken up on Monday of the second week of the fall term of the circuit court of Crenshaw county, and continue all of the second week of each fall term of said circuit court, or until the business is completed."

Monday after the second Monday in August, and, at each term, may continue two weeks; and at Eufaula on the seventeenth Monday after the first Monday in February, and on the seventeenth Monday after the second Monday in August, and, at each term, may continue three weeks.*

IN THE FOURTH CIRCUIT.

Ib. sec. 3.

1. In the county of Dallas, on the last Mondays in February and August, and, at each term, may continue three weeks.

2. In the county of Perry, on the third Mondays after the last Mondays in February and August, and, at each term, may continue three weeks.

3. In the county of Hale, on the sixth Mondays after the last Mondays in February and August, and, at each term, may continue three weeks.

4. In the county of Lowndes, on the ninth Mondays after the last Mondays in February and August, and, at each term, may continue three weeks.

5. In the county of Wilcox, on the twelfth Mondays after the last Mondays in February and August, and, at each term, may continue three weeks.†

IN THE FIFTH CIRCUIT.

Ib. sec. 3, as amended, Feb. 21, 1887, p. 159.

1. In the county of Autauga, on the first Monday in February, and may continue one week; and on the fourth Monday in July, and may continue two weeks.

2. In the county of Elmore, on the second Monday in February, and may continue one week; and on the second Monday after the fourth Monday in July, and may continue two weeks.

3. In the county of Bibb, on the third Monday in February, and on the fourth Monday after the fourth Monday in July, and, at each term, may continue one week.

4. In the county of Chilton, on the third Monday after the first Monday in February, and on the fifth Monday after the fourth Monday in July, and, at each term, may continue two weeks.

5. In the county of Macon, on the fifth Monday after the first Monday in February, and on the seventh Monday after the fourth Monday in July, and, at each term, may continue three weeks.

6. In the county of Coosa, on the eighth Monday after the first Monday in February, and on the tenth Monday after the fourth Monday in July, and, at each term, may continue one week.

7. In the county of Tallapoosa, on the ninth Monday after the first Monday in February, and on the eleventh Monday after the

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* By act approved December 9, 1886 (Pamph. Acts, 1886–7, p. 184), it is provided that "the criminal docket of the circuit court in the counties of Russell, Bullock, and at Eufaula in Barbour county, shall be taken up on the second Monday of the term."

† By act approved December 10th, 1886 (Pamph. Acts 1886–7, p. 186), it is provided that "in all civil cases that stand for trial in the circuit courts of Hale, Perry, Dallas, Lowndes and Wilcox counties, the defendant must file his pleas or demurrers, within the first two days of the term, and the pleadings be made up in the two succeeding days, unless the time be enlarged by the court."

fourth Monday in July, and, at each term, may continue two weeks.

8. In the county of Chambers, on the eleventh Monday after the fourth Monday in February, and on the thirteenth Monday after the fourth Monday in July, and, at each term, may continue two weeks.

9. In the county of Randolph, on the thirteenth Monday after the first Monday in February, and on the fifteenth Monday after the fourth Monday in July, and, at each term, may continue one week.

IN THE SIXTH CIRCUIT.

1. In the county of Winston, on the second Mondays in February and August, and, at each term, may continue one week. Ib. sec. 3.

2. In the county of Walker, on the third Mondays in February and August, and, at each term, may continue two weeks.

3. In the county of Fayette, on the first Mondays after the fourth Mondays in February and August, and, at each term, may continue two weeks.

4. In the county of Lamar, on the third Mondays after the fourth Mondays in February and August, and, at each term, may continue two weeks.

5. In the county of Tuskaloosa, on the sixth Mondays after the fourth Mondays in February and August, and, at each term, may continue two weeks. As amended, Dec. 8, 1886, p. 160.

6. In the county of Sumter, on the eighth Mondays after the fourth Mondays in February and August, and, at each term, may continue three weeks, unless the business of the term is sooner disposed of. Ib.

7. In the county of Pickens, on the eleventh Mondays after the fourth Mondays in February and August, and, at each term, may continue two weeks. Ib.

8. In the county of Greene, on the thirteenth Mondays after the fourth Mondays in February and August, and, at each term, may continue three weeks, unless the business of the term is sooner disposed of.* Ib.

IN THE SEVENTH CIRCUIT.

1. In the county of Talladega, on the fourth Mondays in January and July, and, at each term, may continue four weeks. Ib. sec. 8

2. In the county of Calhoun, on the fourth Mondays after the fourth Mondays in January and July, and, at each term, may coutinue three weeks.†

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* By section 2 of act of December 8, 1886, it is provided: "That the criminal docket for said courts [Tuskaloosa, Sumter, Pickens, and Greene], when the term of the court is for two weeks or more, shall be taken up on Monday of the second week of said term."

† By act approved February 28, 1887 (Pamph. Acts, 1886–7, p. 161), it is enacted: "That it shall be the duty of the presiding judge, at each term of the circuit court of Calhoun county, to devote the first week of the term to the trial of civil causes, and the second week to the trial of criminal cases, and so much of the third week as may be necessary for the disposition of the cases on the criminal docket of said court; *Provided*, The presiding judge may set down for trial for the third week any civil business undisposed of during the first week of the term; *And provided further*, That the said judge shall have the power, at any day during the third week, to continue the criminal docket for the term." It is further enacted, "That said presiding judge shall, on the first Saturday of each term, and at any day thereafter he may see proper, take up the motion docket of said court, and hear and determine the business thereon."

3. In the county of Cleburne, on the seventh Mondays after the fourth Mondays in January and July, and, at each term, may continue two weeks.

4. In the county of Clay, on the ninth Mondays after the fourth Mondays in January and July, and, at each term, may continue two weeks.

As amended, Dec. 9, 1886, p. 185.

5. In the county of Shelby, on the eleventh Mondays after the fourth Mondays in January and July, and, at each term, may continue three weeks.

Ib.

6. In the county of St. Clair, on the fourteenth Mondays after the fourth Mondays in January and July, and, at each term, may continue two weeks.

Ib.

7. In the county of Jefferson, on the sixteenth Mondays after the fourth Mondays in January and July, and, at each term, may continue until the business is disposed of.

IN THE EIGHTH CIRCUIT.

Ib. sec. 3, as amended Dec. 9, 1886, p. 185.

1. In the county of Lauderdale, on the first Mondays in March and September, and, at each term, may continue two weeks.

2. In the county of Colbert, on the third Mondays in March and September, and, at each term, may continue two weeks.

3. In the county of Franklin, on the first Mondays after the fourth Mondays in March and September, and, at each term, may continue one week.

4. In the county of Marion, on the second Mondays after the fourth Mondays in March and September, and, at each term, may continue one week.

5. In the county of Lawrence, on the fourth Mondays in April and October, and, at each term, may continue two weeks.

6. In the county of Morgan, on the second Mondays after the fourth Mondays in April and October, and, at each term, may continue two weeks.

7. In the county of Cullman, on the fourth Monday after the fourth Monday in April, and may continue one week; and on the fourth Monday after the fourth Monday in October, and may continue two weeks.

8. In the county of Limestone, on the fifth Monday after the fourth Monday in April, and on the sixth Monday after the fourth Monday in October, and, at each term, may continue two weeks.

9. In the county of Madison, on the first Monday in February, and on the first Monday in August, and, at each term, may continue four weeks; the criminal docket to be taken up the third week.

Ib. sec. 3.

IN THE NINTH CIRCUIT.

As amended, Feb. 17, 1885.

1. In the county of Cherokee, on the first Monday in December, and shall continue three weeks, and the state docket shall be taken up on Monday of the third week; and on the second Monday in July, and continue two weeks, and the state docket shall be taken up on Monday of the second week.

2. In the county of DeKalb, on the fourth Mondays in January and July, and, at each term, may continue two weeks.

3. In the county of Jackson, on the second Mondays after the fourth Mondays in January and July, and, at each term, may continue three weeks.

4. In the county of Marshall, on the fifth Mondays after

the fourth Mondays in January and July, and at each term may continue two weeks.

5. In the county of Blount, on the seventh Mondays after the fourth Mondays in January and July, and, at each term, may continue two weeks.

6. In the county of Etowah, on the ninth Mondays after the fourth Mondays in January and July, and, at each term, may continue four weeks.

750. When courts to be opened.—The courts of the several judicial circuits shall not be open before noon of the first Monday of each term. Ib. sec. 5.

751. When criminal dockets to be taken up.—The criminal dockets of such courts, unless otherwise expressly provided by law, shall be taken up, when the term of the court is for two weeks, on the second Monday of the term, and when the term is for three weeks, or more, on the third Monday of the term. Ib. sec. 4.

752 (652). **Special terms.**—A special term of the circuit court may be held in any county, whenever, in the opinion of the judge of the circuit, such term is necessary; and at such special term a grand jury may be organized, causes, both civil and criminal, pending in the court, may be tried and disposed of, and any other business before the court may be transacted, as at a regular term, except that the order of business fixed by the judge must be observed; but no special term shall continue longer than two weeks.

Aaron v. State, 39 Ala 684; Grant v. State, 62 Ala. 233; Bales v. State, 63 Ala. 30; Martin v. State, 77 Ala 1.

753 (653). **Notice of special term; order of business.** Thirty days' notice of such special term, and of the order in which the business of the court will be transacted thereat, shall be given by advertisement in some newspaper in the county, or if none is published therein, in such newspaper as the judge may designate.

754 (661). **Witnesses and process.**—Witnesses must be subpœnaed to a special term, and all process relating to the business of such term made returnable to it; and executions and other process on judgments rendered at such term shall be returnable to the next regular term, if more than thirty days intervene, otherwise, to the second regular term thereafter.

755 (654). **Adjourned terms.** — Whenever, at any regular term of a circuit court, there shall be a failure to dispose of all the business of the court, the presiding judge shall adjourn the court until such time as he can return and complete such business, unless, in his opinion, the public good does not require such adjournment; and an entry of the adjournment on the minutes of the court shall be notice of the same; and all witnesses and parties shall attend the adjourned term without further subpœna or notice. In the entry of such adjournment, the order in which the unfinished business will be transacted may be prescribed, and all necessary orders made for summoning jurors to serve at the adjourned term. All executions and other process on judgments rendered at the regular term shall issue as though the court had adjourned sine die; and all executions and other process on judgments rendered at the adjourned term shall be returnable to the next regular term.

Hundley v. Yonge, 69 Ala. 89; Martin v. State, 77 Ala. 1.

ARTICLE II.

CIRCUIT COURT AND THE JURISDICTION THEREOF; CIRCUIT JUDGES AND THEIR POWERS; OTHER PROVISIONS RELATING TO SUCH COURT AND JUDGES.

As amended, Dec. 12, 1884, p. 88, sec. 1.

756 (657). **Jurisdiction of the circuit court.**—The circuit court has authority,—

1. To exercise original jurisdiction of all felonies and misdemeanors; of all actions for libel, slander, assault and battery, and of ejectment, without regard to the amount involved; and of all other suits and actions at law when the matter or sum in controversy exceeds fifty dollars.

Hogan v. Odam, 3 Stew. 58; Hargrove v. Smith, 1 Ala. 80; Huggins v. Ball, 19 Ala. 587; Cahuzac v. Samini, 29 Ala. 288; McClure v. Lay, 30 Ala. 208; Nowlin v. McCalley, 31 Ala. 678; Carew v. Lillienthall, 50 Ala. 44; Haws v. Morgan, 59 Ala. 508.

2. To exercise appellate jurisdiction of all civil actions cognizable before a justice of the peace, and in such other cases as may be provided by law.

3. To exercise a general superintendence over all inferior jurisdictions.

Etheridge v. Hall, 7 Port. 47; Ex parte Tarlton, 2 Ala. 35; Marion v. Chandler, 6 Ala. 899; Barnett v. State, 15 Ala. 829; Commissioners v. Thompson, 1b. 134; Ex parte Russell, 29 Ala. 717; Withers v. State, 36 Ala. 252; Ex parte Henderson, 43 Ala. 392; Davidson v. Washburn, 56 Ala. 596; Leslie v. Tucker, 57 Ala. 483; Ex parte Boothe, 64 Ala. 312; State v. Williams, 69 Ala. 311; Ex parte Pearson, 76 Ala. 521; Dunbar v. Frazer, 78 Ala. 529.

4. To punish contempts by fine, not exceeding fifty dollars, and by imprisonment, not exceeding five days.

5. To exercise such other powers, not contrary to the constitution, as are, or may be given to such court by law.

757 (655, 668). **Residence and salary of judge.**—Each circuit judge must reside in the circuit for which he is elected or appointed twelve months preceding, and at the time of his election or appointment, and during his continuance in office; and his salary shall be twenty-two hundred and fifty dollars per annum.*

758 (658). **Authority of judges.**—Such judges have authority,—

1. To grant writs of certiorari, supersedeas, quo warranto, mandamus, and all other remedial and original writs which are grantable by judges at common law.

Ex parte Henderson, 43 Ala. 392; Ex parte Grant, 53 Ala. 16; Ex parte Boothe, 64 Ala. 312.

2. To grant writs of injunction and ne exeat, returnable into the courts of chancery.

3. To administer oaths and take affidavits in all cases in which oaths and affidavits are required by law.

4. To exercise such other powers as are, or may be granted them by law.

759 (660). **Absence of judge adjourns the court.**—When any circuit judge fails to attend, the court stands adjourned from day to day until three o'clock in the afternoon of the third day, when it is adjourned to the next succeeding term.

760 (662). **Forfeiture for failure to hold court, or for absence from it.**—If any circuit judge fails or neglects to attend

* After January 1, 1888, salary fixed at $2,500 per annum.—Pamph. Acts 1886-7, p. 134.

any regular term of any circuit court which he takes upon himself to hold, or, after attending, absents himself before the time fixed for final adjournment, unless the business is sooner disposed of, he forfeits the sum of twenty-five dollars for each and every day he is thus absent or fails to attend, to be deducted by the auditor from his salary; the absence or failure of such judge to be certified to the auditor by the clerk within ten days after the term, under a penalty of one hundred dollars, to be recovered by the solicitor in the circuit court of his county, in the name of the state, on two days' notice.

761 (663). **Exceptions to provisions of preceding section.** The deduction provided for in the preceding section must not be made, if the judge makes an affidavit that such failure to attend, or absence was on account of sickness of himself or family, or inevitable accident, or of an epidemic or contagious disease, or well-grounded apprehension thereof.

762 (665). **Sheriff to summon three constables to attend court.**—The sheriff of the county must summon three constables to attend at each term of the circuit court; and should any one of them fail to attend, a conditional judgment may be entered against him of ten dollars, which must be made absolute, unless he appears at the next term and shows a good excuse for not attending.

763 (666). **Compensation to such constables.**—Such constables attending receive each one dollar and fifty cents for each day's attendance, to be paid out of the county treasury, on the certificate of the clerk, showing the number of days they have attended.

764 (667). **Acts, etc., where kept; duties in reference to; default in duty a contempt.**—On the first day of each term of the circuit court, the sheriff, at the instance of the presiding judge thereof, must apply to the judge of probate for the session acts of the general assembly, the supreme court reports, Smith's condensed reports, and Brickell's digest, furnished by the state to each county, and the judge of probate must deliver them to the sheriff, whose duty it shall be to keep them in the court-room, conveniently arranged, for the use of the court during the term; and if the judge of probate or sheriff fails or refuses to discharge any of the duties required of him by this section, he shall be deemed guilty of a contempt of court, and shall be fined therefor, at the discretion of the presiding judge, in a sum not to exceed twenty dollars.

ARTICLE III.

CLERKS OF THE CIRCUIT COURT, THEIR QUALIFICATIONS, DUTIES AND POWERS; OTHER PROVISIONS RELATING TO THEIR OFFICE.

765 (669). **Official bond of clerk.**—Before entering upon the performance of the duties of his office, the clerk of the circuit court must give bond, with sufficient sureties, in such sum as the circuit judge or the judge of probate of his county may require, not less than two thousand dollars, payable to the State of Alabama, and conditioned faithfully to discharge the duties of his office during the time he continues therein, or discharges any of the duties thereof; which bond must be ap- As amended, Dec. 6, 1880, p. 46.

proved by the circuit judge, or such judge of probate, and filed and recorded in the office of the judge of probate.

766 (670). **Their offices; where kept.**—Such clerks must keep their offices at the court-house, or within one mile thereof.

767 (676). **Their authority.**—Clerks of the circuit court have authority,—

1. To administer oaths and take affidavits in all cases in which the authority to administer such oath or take such affidavit is not confined to some other officer.

2. To appoint deputies, with full power to transact all business of such clerks, such deputy first taking an oath to support the constitution and laws of this state, and faithfully to discharge the duties of deputy clerk of the court for which he acts.

Minniece v. Jeter, 65 Ala. 222; Joseph v. Cawthorn, 74 Ala. 411.

3. To receive the amount of any judgment rendered in the courts of which they are clerks, either before or after the issue of execution thereon.

Haynes v. Wheat, 9 Ala. 239; McDonell v. Bank, 20 Ala. 313; Governor v. Read, 38 Ala. 252; Aicardi v. Robbins, 41 Ala. 541.

4. To exercise such other powers as are, or may be conferred upon them by law.

768 (671). **Their duties.**—It is the duty of clerks of the circuit court,—

1. To sign and issue all summons, subpœnas, writs, executions and other process, under the authority of the court.

2. To keep an appearance docket of civil cases, in which must be entered all the civil actions brought to each term, the names of the parties, the character of action, the names of the attorneys by whom the same are brought, and the sheriff's return.

3. To keep a trial docket of civil cases, in which must be entered all the civil cases standing for trial at each term, in the order in which they are brought, the names of the attorneys employed, the character of the action, and the orders which have been made in each cause at any previous term.

4. To keep a trial docket of criminal cases, in which must be entered all the criminal cases in their order, the character of the offense, the return of the sheriff, the orders which have been made in each case at any previous term, and the names of the attorneys for the defense.

5. To keep a motion docket for entering all motions intended to be submitted to the court.

6. To keep separate subpœna dockets for civil and criminal cases, in which must be entered the cases in which any subpœnas are issued, the names of the witnesses, the time of the issue, and the return of the sheriff.

7. To keep an execution docket, in which must be entered all executions issued, specifying the names of the parties, the amount of the judgment, and the day and year of its rendition, the amount of costs, the character of the execution, the date of its issue, the person to whom delivered, and the date of such delivery, the day when returned, the return in full on the same page on which the execution is entered, and the number of the execution.

8. To keep a book, in which must be entered the minutes of each day's proceeding during the term of the court, and the

orders and judgments, in the order in which they are made or rendered.

9. To record in well-bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under section 653 (562), except the subpœnas, affidavits for continuance, commissions to take testimony, evidence and executions.

10. To enter on the fee book, execution docket and on the execution, the name of the attorney for the plaintiff in the judgment.

11. To keep and file the books and dockets and papers in relation to, and the records of all suits which have been determined in the county court, and deposited with them, as they are required to keep and file the books, dockets, papers and records of suits in the circuit court; and to issue all writs of execution, scire facias, writs of error, or other process, on the judgments in such court, returnable as if such suits had been determined in the circuit court.

12. To keep all the papers, books, dockets and records belonging to their office, with care and security; the papers filed, arranged, numbered and labeled, so as to be of easy reference; and the books, dockets and records properly lettered; and to allow parties to inspect the records, free of charge.

13. To attend court during the session thereof, with all the papers belonging to the term, so filed as to be of easy reference; to keep in the court-house during such session, convenient of access, the execution dockets for the two preceding terms; and to administer all oaths, and take all affidavits in relation to causes or proceedings pending therein.

14. To make out and deliver, on application and payment of the legal fees therefor, to any person applying for the same, a correct transcript, properly certified, of any paper or record in their offices.

15. To make out transcripts, as required by law, in all cases of appeal to the supreme court.

16. To render to the county treasurer, within ten days after each term of the court, a statement, in writing and under oath, of the fines assessed and forfeitures obtained during such term, the amount of each, and against whom each was assessed or obtained, and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deducting from such amount five per cent. for their compensation, they must pay the balance to the county treasurer.

17 (672). To keep reverse indexes of all record books in their offices, which must always be in good and substantial, well-bound books; but they are not required to prepare any new indexes when those already in his office are sufficient.

18. To perform such other duties as are, or may be required by law.

769 (674). **Records open to examination.**—The records of the clerk's office must be free for the examination of all persons, when not in use by him.

770 (673). **Recopy of books in his office.**—The clerk, deeming it necessary to recopy any books in his office, in order to secure their contents from damage or loss, must submit the

same to the examination of the court of county commissioners' who, if they deem such recopy necessary, must, upon the minutes of the court, order the same to be made; and the clerk must make the same in good and substantial books; and such court must allow him a reasonable compensation therefor.

771 (677). **When to collect sheriff's commissions.**—When any clerk receives payment of a judgment, he must collect the costs and commissions of the sheriff, if execution has issued on such judgment.

772 (675). **Duty of clerk when convict indicted; convict not released until bail is given.**—The clerk of any circuit court must, without delay, certify a copy of any indictment in his court against a convict sentenced to the penitentiary, or to hard labor for the county, in the former case to the governor and president of the board of inspectors, in the latter, to the hirer of the county convicts; and such convict, if pardoned for the offense for which he is sentenced, must not be discharged until he enters into a recognizance to answer such indictment at the next term of the court in which the same is pending, if the case is bailable, or is otherwise legally discharged from such indictment.

773 (683). **Clerk's duty to pay over money to his successor.**—Any clerk of the circuit court, having in his hands, at the expiration of his term of office, any money held by him, subject to the further order, decree, or judgment of any court, shall, on demand, pay the same to his successor in office; and upon such payment, he shall be discharged from further liability therefor.

774 (682). **Clerk's stationery to be paid for by the county.** The court of county commissioners must allow to the clerk of the circuit court the amounts properly expended by him for books and stationery for the use of his office.

Commissioners v. Goldthwaite, 35 Ala. 704.

775 (678). **Committee to examine clerk's office.**—The judge of the circuit court must, in term time, as often as he thinks the public interests require, appoint in each county one or more persons, not exceeding three, to examine the office of the clerk of the circuit court of such county.

776 (679, 681). **Oath and duty of such examiners.**—The persons so appointed must take and subscribe an oath, well and truly to examine the records, books and dockets of such court, and the condition of the office of the clerk generally; and must, in the vacation after such court, examine such office, books, records and dockets, and report the condition of the same to the next term of the court, in writing, specifying particularly any neglect of duty, or any thing done wrongfully or corruptly in relation to such office; and for their services they shall receive such compensation as may be allowed them by the court of county commissioners.

777 (680). **Their report to be recorded.**—The report of such examiners, when made, must be recorded in the office of the judge of probate, and shall be subject to the inspection of all persons, free of charge.

CHAPTER 5.

COURTS OF PROBATE.

778 (684). **The judge; his term of office.**—A judge is elected in each county at the time hereinbefore prescribed, who is styled the judge of probate, and who holds his office six years, and until the election and qualification of his successor.

779 (685). **Eligibility.**—The judge must be a citizen of the state, and must have resided in the county for which he is elected, or appointed, one year preceding the election or appointment.

780 (686). **Vacancies; how filled.**—Vacancies in the office of judge of probate are supplied by the governor, and the person appointed holds office until the election and qualification of his successor, except in case of removal from office.

781 (687). **Bond.**—Before entering on the duties of his office, the judge must give bond with surety to be approved, and for a sum, not less than five thousand dollars, to be fixed, by a judge of the supreme court, or by the judge of the circuit, or the chancellor of the division, in which such judge resides.

Thompson v. Holt, 52 Ala. 491; Grider v. Tally, 77 Ala. 422.

782 (688). **Bond recorded and filed.**—Such bond, after being recorded in the office of the clerk of the circuit court of the county for which he was elected or appointed, must be filed in the office of the secretary of state, with the certificate of the clerk of the circuit court, that the bond has been recorded in his office.

783 (689). **Who may sue on the bond.**—All bonds given by judges of probate may be sued on by any one sustaining any injury, by reason of any neglect or omission of such officer to take good and sufficient surety from any executor, administrator, or guardian, or from any officer whose bond it is his duty to approve, or in any case in which it is his duty to require additional bond, and he fails so to do, or by the failure of such judge to perform any other official duty.

784 (690). **Conservator of the peace.**—Judges of probate are conservators of the peace in their respective counties.

785 (691). **Office and office hours.**—He must keep his office at the court-house, and open for the transaction of business, at least on Mondays, Tuesdays and Saturdays of each week, except the fourth day of July and Christmas, from nine in the morning until four in the afternoon, with an interval of one hour at noon.

786 (692). **To keep a seal of office.**—He must have a seal of office, using a private seal until the same is provided.

787 (693). **Jurisdiction of courts of probate.**—Courts of probate have, in the cases defined by law, original jurisdiction of,—

1. The probate of wills.
2. The granting of letters testamentary and of administration, and the repeal or revocation of the same.

Subd. 1 and 2: Jurisdiction general.—Ikelheimer v. Chapman, 32 Ala. 676; Bradley v. Broughton, 34 Ala. 694; Gray v. Cruise, 36 Ala. 559; Coltart v. Allen,

40 Ala. 155; Hall v. Hall, 47 Ala. 290; Bean v. Chapman, 62 Ala. 58; Sims v. Waters, 65 Ala. 442; Steele v. Tutwiler, 68 Ala. 107; Landford v. Dunklin, 71 Ala. 594; Morgan v. Casey, 73 Ala. 222.

3. All controversies in relation to the right of executorship, or of administration.

4. The settlement of accounts of executors and administrators.

5. The sale and disposition of the real and personal property belonging to, and the distribution of intestates' estates.

Jurisdiction limited; sales of personalty.—Wyatt v. Rambo, 29 Ala. 510; Ikelheimer v. Chapman, 32 Ala. 676; Hall v. Chapman, 35 Ala. 553. **Sales of lands.** Wyman v Campbell, 6 Port. 219; Couch v. Campbell, Ib. 262; Duvall v. McLoskey, 1 Ala. 708; Perkins v. Winter, 7 Ala. 855; Bishop v. Hampton, 15 Ala. 761; Pettit v. Pettit, 32 Ala. 288; Landford v. Dunklin, 71 Ala. 594.

6. The appointment and removal of guardians for minors and persons of unsound mind.

7. All controversies as to the right of guardianship, and the settlement of guardians' accounts.

8. The binding out of apprentices, and all controversies between master and apprentice.

9. The allotment of dower in lands in the cases by law provided.

10. The partition of lands within their counties.

11. The change of the name of any person residing in their county, upon filing his declaration in writing, signed by him, stating the name by which he is known, and the name to which he wishes it to be changed.

12. In such other cases as jurisdiction is or may be given to such courts by law, and in all cases to be exercised in the manner prescribed by law.

Court has no jurisdiction of trusts.—Ex parte Dickson, 64 Ala. 188; Pinney v. Werborn, 72 Ala. 58; Foxworth v. White, Ib. 224; Hinson v. Williamson, 74 Ala. 180. **Probate of wills and grant of letters during late war.**—Nelson v. Boynton, 54 Ala. 368; Allen v. Kellam, 69 Ala. 442; Bean v. Chapman, 73 Ala. 140. **Presumptions indulged on collateral attack.**—Boynton v. Nelson, 46 Ala. 501; Wright v. Ware, 50 Ala. 549; Pettus v. McClannahan, 52 Ala. 55; Doe v. Hardy, Ib. 291; Gamble v. Jordan, 54 Ala 432. **Is a court of law and has not chancery powers.** Moore v. Winston, 66 Ala. 196.

788 (694). **May punish contempts of court.**—Such courts may issue rules and attachments for contempts offered to the court, or its process, by any executor, administrator, guardian, or other person, and may punish the same by fine as high as twenty dollars, and imprisonment, not exceeding twenty-four hours; one or both.

789 (695). **Duties, etc.**—It is the duty of the judge of probate,—

1. To issue all citations, letters testamentary, of administration and guardianship, subpœnas, executions, and all other process which is necessary for the exercise of his powers, the jurisdiction of the court, and the enforcement of its judgments, orders and decrees.

2. To keep minutes of all his official acts and proceedings; and, within three months thereafter, to record the same in well-bound books.

3. To keep all the books, papers and records belonging to his office with care and security; the papers arranged, filed and labeled, so as to be of easy reference; and the books and records lettered, and kept with general, direct and reverse indexes; but,

without authority of the court of county commissioners, must not make new indexes.

4. To keep constantly in his office a well arranged docket, showing the date of the issue, and return of all process, the day set for the hearing, the kind of notice ordered, the returns of the sheriff, and such other entries as may be necessary to show the true condition of all proceedings pending in the court, and all fees accruing in the case, and to whom due.

5. To keep a correct account of the fees accruing to the sheriff, for service of notices, citations and other process in relation to estates of deceased persons and minors; he may receive and receipt for such fees, and must, on demand, pay the same to the sheriff, and before the final settlement of any estate is allowed, the fees of the sheriff, or such part thereof as he is entitled to receive, must be paid.

6. To enter on the fee book, execution docket, and on the execution, the name of the attorney of the plaintiff in the judgment.

7. On application of any person, and the payment or tender of the lawful fees, to give transcripts of any paper or record required to be kept in his office, properly certified.

8. To perform such other duties as are, or may be required of him by law.

9. To keep the acts, reports and digests furnished by the state to the county in his office, or in the bar library, if there be one in the county convenient to his office, except when delivered to the sheriff for the use of the circuit court.

10. To have suitably bound at the expense of the county, and for the payment of which binding the court of county commissioners must issue a warrant on the county treasury, the reports of the census enumerators of the county; and must keep such reports in the office, open to examination without charge. Feb. 17, 1881, p. 144.

11. To provide a suitable and convenient place in the office for keeping the United States census reports, and to preserve such reports, giving free access to them. Dec. 6, 1882, p. 8.

790. (697). **Recopy of books.**—The judge of probate, deeming it necessary to recopy or rebind any books in his office, in order to secure their contents from damage or loss, must submit the same to the examination of the court of county commissioners, which, if it deems such rebinding or recopy necessary, must upon its minutes order the same to be made; and the judge of probate must make the same in good and substantial books or binding, and such court must allow him a reasonable compensation therefor.

791 (698). **Free for examination.**—The records of the office must be free for the examination of all persons, when not in use by the judge.

792 (699). **Decrees paid to judges.**—Decrees for the payment of money, rendered against any executor, administrator, or guardian, on a partial or final settlement, may be paid to the judge of probate, and it is his duty to pay over the same to the person entitled thereto on demand; and for failure to do so, he incurs a penalty in favor of the person entitled to the money of ten per cent. damages, which, together with the money received, and interest thereon, may be recovered by suit on his bond. As amended, Jan. 17, 1879, p. 78.

Shackleford v. Cunningham, 41 Ala. 203; Ellis v. Smith, 42 Ala. 349.

793 (700). **Pay of judge.**—The judge of probate is entitled to one-half of one per cent. for receiving money under the preceding section, to be paid by the party from whom the same is received, out of his own funds, and is not bound to receive this money until such per cent. is paid.

794 (701). **Regular and adjourned terms; when court always open.**—A court of probate must be held at the courthouse of each county on the second Monday in each month, and the judge may hold special or adjourned terms at any time whenever necessary for any special purpose; but such court must at all times be considered as open, except on Sundays, with authority to do all things needful in relation to granting letters testamentary, of administration, or guardianship, and all matters appertaining thereto; binding out apprentices, and making all other necessary orders which are grantable as a matter of course.

Moore v. McGuire, 26 Ala. 461; Harrison v. Meadors, 41 Ala. 274; Arrington v. Roach, 42 Ala. 155; Roach v. Gunter, Ib. 239; Horn v. Bryan, 44 Ala. 88; Boynton v. Nelson, 46 Ala. 501; Vaughan v. Bibb, 46 Ala. 153; Kelly v. Garrett, 67 Ala. 304; Lanier v. Richardson, 72 Ala. 134; Carlisle v. May, 75 Ala. 502; Blake v. Harlan, Ib. 205.

795 (702). **Authority.**—The judge of probate has authority,—

1. To administer oaths and take and certify the same in all cases in which administering such oath, and taking such affidavit, is not confined expressly to some other officer.

2. To grants writs of habeas corpus in those cases in which the power is conferred by law.

3. To grant writs of certiorari on any civil judgment rendered by a justice, returnable to the next circuit court of the county, and to issue process of garnishment upon decrees for money in the court.

Wilson v. Ellis, 42 Ala. 348.

4. To cause jurors to be impaneled and sworn in any matter of fact pending before him, in which the right to a jury trial is given by law.

5. To appoint guardians ad litem for minors and persons of unsound mind, when necessary; but he must not appoint as such guardian any clerk, employe, or other person connected with his office, or related to him by consanguinity or affinity.

6. To employ, at his own expense, a clerk, for whose official acts he is responsible; and such clerk shall have the following powers: (1) To do all acts not judicial in their character; (2) to issue letters testamentary, of administration and guardianship, where there is no contest; (3) to administer oaths relating to the business of the court, and take and certify acknowledgments and proofs of instruments authorized to be recorded; and such clerk must, before entering upon his duties, take the oath directed to be taken by the officers of the state, and give bond, with surety, payable to the judge of probate, in such sum, not exceeding five thousand dollars, as he may prescribe, upon which bond such clerk shall be liable to such judge in consequence of any act of such clerk, or any misfeasance or malfeasance of such clerk in the duties of his office.

Halso v. Seawright, 65 Ala. 431; Hood v. Powell, 73 Ala. 171.

7. To complete the minute entries and decrees of the court when the same are incomplete on account of the failure to

make the necessary entries at the time when they should have been made, but the necessary application and proof must first be made; and such entries, orders, or decrees are as valid and binding as if they had been made at the proper time.

Box v. Delk, 47 Ala. 729; Acklen v. Acklen, 45 Ala. 609; Dabney v. Mitchell, 54 Ala., 198; Lilly v. Larkin, 66 Ala. 122.

8. To exercise such other powers as are, or may be conferred on him by law.

796 (703). **Letters of administration, process, etc.; how signed, and form.**—All letters testamentary, of administration, and of guardianship, and all process from the court of probate, are to be signed by the judge, or his clerk, bear date on the day of the issue, and conform, as near as may be, to those used in the courts of law in this state; and must be directed, executed and returned in like manner, and under the same penalties.*

797 (708). **Writs of garnishment.**—Courts of probate may issue process of garnishment upon decrees for money, in favor of plaintiffs in such decrees, returnable to their regular terms, upon compliance with the laws respecting garnishments in the circuit courts on judgments; and may render judgments or decrees on the answers of such garnishees, enforce the collection thereof by execution, as may be necessary, and try all collateral issues that may grow out of the answers of such garnishees, both as to a contest of the answer, or a claim of an alleged transferee.

Smith v. Jackson, 56 Ala. 25.

798 (709). **Provisions applicable to preceding section.** The provisions of this Code in reference to garnishments in the circuit court are applicable to garnishments in the courts of probate.

799 (710). **Return of process.**—All executions and other process issuing from the court of probate, or issued by the judge thereof, may be made returnable, if no other day is provided by law, to any regular term of the court of probate, not less than three, nor more than six months after such issue, or to any special term within the same period.

Carlisle v. May, 75 Ala. 502.

800 (711). **Failure to execute or return process.**—For a failure to make the money on, or for failing to return any execution issued from, or returnable to the court of probate, or for not paying over money collected on such execution, the sheriff, coroner, or other officer, and his sureties, are liable to the same penalties and judgments, as in like cases in the circuit court; the proceedings to be instituted and conducted in the probate court in the same manner as in the circuit court, either party having the right, on request, to a trial of all questions of fact by a jury; and an appeal from the judgment rendered may be taken to the circuit or supreme court, as in like cases from the circuit to the supreme court.

801 (712). **Rules of evidence.**—The provisions of this Code in reference to evidence in courts of law, and the mode of obtaining the same by deposition, and of compelling the attendance of witnesses, in the absense of express provision to the

* Sections 704 to 707 of Code of 1876, inclusive, transposed to Trial of Right of Property.

contrary, are applicable to proceedings in the court of probate.

802. Supplying place of judge of probate when incompetent.—If, in any matter or proceeding arising in the court, or in reference to which the judge thereof is required to exercise jurisdiction or authority, or to perform duty, the judge is incompetent for any legal cause, he must certify the fact of incompetency to the register in chancery of the county, or if the register is incompetent, to the judge of the circuit, or to the chancellor of the division; and such register, judge, or chancellor must, upon such certificate, appoint a disinterested person practicing in the county, learned in the law, to act as special judge of probate; and such special judge, in relation to such matter or proceeding, shall have the jurisdiction and authority, and discharge the duties of judge of probate. And the orders and decrees made or rendered by him shall be entered on the records of the court, and shall have the force and effect, and shall be subject to revision on appeal, or by other revisory remedy, of orders and decrees of the court of probate, or of the judge thereof.

803. Supplying place of such special judge.—If the special judge so appointed fails or refuses to act, or having commenced to act, and before finally concluding or determining such matter or proceeding, becomes incompetent, or fails or refuses to continue acting therein, the incompetency of the judge of probate continuing, the register, or the judge, or chancellor, on the fact being certified to him, must appoint another special judge of like qualification.

804 (716). **Change of venue.**—In all issues in the probate court, where a jury may be called to try contested facts, changes of venue may be had as in cases of contested wills; and all the provisions as to change of venue in cases of contested wills shall apply to changes of venue under this section.

805 (717). **Stationery of office paid for by county.**—The judge of probate must be allowed reasonable expenses for suitable books, stationery, and a seal of office, to be paid by the county.*

CHAPTER 6.

THE SHERIFF.

806 (726). **Bond; penalty, approval.**—The sheriff, before entering on the duties of his office, must give bond with surety in an amount to be fixed by the judge of probate of his county, not less than five thousand dollars, payable and conditioned as provided in section 257 (163), which bond must be approved by the judge of probate, and recorded and filed in his office.

807 (727). **Bond, when there is no judge of probate.**—If there is no judge of probate, the amount of such bond must be fixed, and the bond approved by the clerk of the circuit court, and recorded and kept in his office, until the office of judge of probate is filled, when it must be delivered to him and recorded and kept in his office.

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* The chapter on County Courts transposed to Criminal Code.

808 (728). **Office.**—Each sheriff must keep his office within one mile of the court-house.

809 (729). **Deputies.**—He must have one deputy, and may have as many as he thinks proper. [1]The coroner must not be appointed as deputy.

[1] Dec. 10, 1878, p. 173.

810 (730). **Duties of sheriff.**—It is the duty of the sheriff,—

1. To execute and return the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to him for that purpose, according to law.

2. To attend upon the chancery and circuit courts held in his county, when in session, and the courts of probate, and the county court, and the court of county commissioners, when required by the judge of probate, and to obey the lawful orders and directions of such courts.

3. The sheriff of each county must, three days before each term of the circuit court in his county, render to the county treasurer a statement, in writing and on oath, of the moneys received by him for the county, specifying the amount received in each case, from whom, and after deducting from such amount five per cent. for his compensation, pay the balance to the county treasurer.

4. To perform such other duties as are, or may be imposed by law.

811 (731). **May perform duties of constables; fees and liability.**—The sheriff is authorized to execute all mesne and final process which is required of constables, and shall receive the same fees and compensation therefor; and he and the sureties on his official bond shall be liable for any abuse of process that he may execute under this section.

812 (732). **His execution docket; contents of.**—Each sheriff must, also, enter in well-bound books, whenever any execution or order of sale is received by him, the names of the parties, the character of the process, the time of its receipt, the date of the judgment or decree on which the same issued, if it appears from such process, the amount of the same, principal and costs, the court from which it issued, and the names of the attorneys as indorsed thereon.

813 (733). **Receipts; what to show.**—He must also enter on the same page, against the entries required by the preceding section, the amount he receives on such execution or order of sale, stating the principal, interest and costs, separately; and also stating separately each item of costs he receives, which is not charged in the bill of costs, the time he receives the same, and his return.

814 (734). **Sale-book; what to show.**—He must keep a sale-book, in which he must enter all the property sold by him under any process from any court, a brief description of such process, when the property was sold, the purchaser, and at what price.

815 (735). **These books open to inspection.**—These books must, at all times, be open to the inspection of the public, free of charge, and must, within sixty days after he goes out of office, be deposited and kept in the office of the clerk of the circuit court of the county.

816 (736). **Coroner; when to act in place of sheriff.**—When

the office of sheriff is vacant, or the sheriff is incompetent to act, the coroner of the county must perform all the duties of sheriff of such county, under the penalties and liabilities imposed by law on sheriffs.

817 (737). **Stationery to be paid for by county.**—The court of county commissioners must furnish books and stationery to sheriffs for official use, in the same manner that books and stationery are furnished to the clerk of the circuit court.

818 (738). **Ex-sheriff pays money to successor.**—The sheriff having in his hands, at the expiration of his official term, any money held by him, subject to the further order, decree or judgment of any court, shall, on the demand of his successor in office, pay the same to him; and on such payment shall be discharged from further liability therefor.

CHAPTER 7.

THE COURT OF COUNTY COMMISSIONERS.

As amended, Feb. 23, 1883, p. 156.

819 (739). **How constituted; a court of record.**—There is in each county a court of record, styled the court of county commissioners, composed of the judge of probate, as principal judge, and four commissioners, who are elected at the times prescribed by law, and hold office for four years.

Commissioners v. Thompson, 15 Ala. 134; s. c., 18 Ala. 694; Barnett v. State, 15 Ala. 829; Lamar v. Commissioners, 21 Ala. 772; Molett v. Keenan, 22 Ala. 484; State v. Falconer, 44 Ala. 696; Trammell v. Pennington, 45 Ala. 673; Joiner v. Winston, 68 Ala. 129.

820 (740). **Vacancy; how filled.**—In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

821 (741). **Commissioners ineligible to certain offices.**—No county commissioner is eligible to, or must discharge the duties, either as principal or deputy, of any office which is filled, or the vacancy in which is supplied by the court, or its members.

822 (742). **Quorum of court.**—The court may be held by the judge of probate and two commissioners, or with three commissioners without the judge of probate; and if as many as two commissioners fail to attend during the first two days of any term, the judge of probate may hold court.

823 (743). **Regular terms, etc.**—Regular terms of the court are held on the second Mondays in February and August, and the first Mondays of April and November; but the time of holding such regular terms may be changed by such court to suit the public convenience, by an order, to be entered on the minutes, and due notice given thereof.

824 (744). **Special terms; notice of.**—In cases where officers are to be appointed, or vacancies supplied, or any other special duty required by law to be performed, a special term must be held, by direction of the judge of probate, upon days' notice by advertisement in some newspaper in the county, or by posting up at the court-house door, and two other public places in the county, notice of the same.

Trammell & Pennington, 45 Ala. 673; Ex parte Selma & Gulf Railroad Co., 46 Ala. 230.

825 (745). **Original jurisdiction of court.**—The court possesses original jurisdiction in relation to the establishment, change, or discontinuance of roads, bridges, causeways and ferries, within the county, to be exercised in conformity with the provisions of this Code.

826 (746). **Authority of court.**—The court has authority,—

1. To direct and control the property of the county, as it may deem expedient according to law.
2. To levy a general tax, for general, and a special tax, for particular county purposes, according to the provisions of this Code.
3. To examine, settle and allow all accounts and claims chargeable against the county.
4. To examine and audit the accounts of all officers having the care, management, collection, or disbursement of money belonging to the county, or appropriated for its use and benefit.
5. To make such rules and regulations for the support of the poor in the county, as are not inconsistent with any law of the state.
6. To punish for contempt by fine, not exceeding ten dollars, and imprisonment, not exceeding six hours.
7. To exercise such other powers as are or may be given by law.

Commissioners v. Moore, 53 Ala. 25; Henry v. Cohen, 66 Ala. 382; Lewis v. Lee County, Ib. 480.

827 (747). **Proceedings to be recorded by judge.**—The judge of probate must record the proceedings of the court, make all necessary orders, and issue all process necessary to sustain its jurisdiction, or maintain its authority.

828 (748). **Proceedings if judge absent.**—When a court is held without the attendance of the judge of probate, a special clerk must be appointed for such term, who must be paid by the judge of probate.

829 (749). **Proceedings if court divided.**—In all matters, where the court is divided, the same must be determined by the judge of probate.

830 (750). **Publication of receipts and disbursements.**—It shall be the duty of the court of county commissioners to make semi-annual publications, on the first days of January and July of each year, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purposes for which expended.

831 (752). **Books and material for county offices; where bought; when payment refused.**—Books, stationery and other material for the use of a county office, must be bought from a person residing and doing business in this state, if such purchase can be made at a price not exceeding that at which it can be made without the state; and if such purchase is not so made, there shall be no payment therefor out of the county treasury; and upon application for payment or allowance, any person has the right to show that such purchase was made in violation of this section.

832 (751). **Copy of field notes.**—The court of county commissioners is authorized to contract with the secretary of state, at an amount not greater than six and a half cents per hundred

As amended, Feb. 12, 1879, p. 62.

words, for certified copies of the field notes of the original government surveys of all the lands in the county, to be made in a book of proper size, to be furnished by the court; and such book shall be deposited in the office of the judge of probate, free to inspection, and making of copies of said field notes by all citizens of the state; and when the same is completed and delivered to the judge of probate, the court of county commissioners must draw a warrant on the county treasurer for the amount due the secretary of state, which shall be a preferred claim against such county.

833 (753). **Laws applicable to courts of like jurisdiction.** All general laws, now in force in this state, or which may be hereafter enacted, in reference to the several courts of county commissioners, shall apply to all similar courts, by whatever name, with like jurisdiction, unless otherwise specially provided.

As amended, Dec. 7, 1878, p. 45.

834 (739). **Compensation of commissioners.**—The commissioners are entitled to two dollars and fifty cents per day for each day of actual service rendered, five cents per mile for traveling to and from the sittings of the court, and such ferriage or toll as they may have paid in such traveling, to be paid by the county treasurer on the certificate of the judge of the court.

CHAPTER 8.

JUSTICES AND CONSTABLES.

ARTICLE 1.—Justices.
2.—Constables.

ARTICLE I.

JUSTICES.

835 (754). **Two justices for each precinct; term of office.** Within the limits of every election precinct are two justices of the peace, elected as hereinbefore prescribed, who hold office for four years.*

836 (755, 299). **Vacancies; how filled, etc.**—Vacancies in the office of justice are to be filled by appointment of the governor; and the justice appointed must be duly commissioned, and holds office for the unexpired term of his predecessor.

837 (300). **Notice of vacancy.**—When a vacancy in any election precinct is occasioned by the death or removal from such precinct of any justice, the other justice for such precinct, if there be one, and if not, the constable therein, must give notice to the judge of probate of such vacancy, the cause and the name of the justice whose office is vacated; and the judge of probate must thereupon notify the governor.

838 (756). **Bond; by whom approved.**—Before entering on the duties of the office, they must give bond and surety, payable and conditioned as provided by law, in the sum of one thousand dollars, which bond must be approved by the judge of probate of the county, and filed and recorded in his office.

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* "And until their successors are qualified," stricken out by joint committee.

Liability on bond.—Lester v. Governor, 12 Ala. 624; McGrew v. Governor, 19 Ala. 89; Kelly v. Moore, 51 Ala. 364; Irion v. Lewis, 56 Ala. 190; Mason v. Crabtree, 71 Ala. 479. **When sureties are estopped** from alleging that their principal was not a justice.—Williamson v. Woolf, 37 Ala. 298. **What a sufficient consideration for bond.**—Williamson v. Woolf, 37 Ala. 298.

839 (757). **Jurisdiction.**—Justices of the peace have original jurisdiction within their respective counties, to be exercised as provided by law,—

1. Of all actions founded on contract, when the sum claimed does not exceed one hundred dollars.

Hogan v. Odam, 3 Stew. 58; Witherspoon v. Barber, Ib. 335; Cothran v. Weir, 3 Ala. 24; Hart v. Turk, 15 Ala. 675; Rose v. Thompson, 17 Ala. 628; Vaughn v. Robinson, 20 Ala. 229; Crabtree v. Cliatt, 22 Ala. 181; Pike v. Bright, 29 Ala. 332; Herrin v. Buckelew, 37 Ala. 585; Pearce v. Pope, 42 Ala. 319; Long v. Bakefield, 48 Ala. 608; Solomon v. Ross, 49 Ala. 198.

2. Of all actions founded on any wrong or injury, when the damages claimed do not exceed fifty dollars, except in actions for libel, slander, assault and battery, and actions of ejectment, of which actions they have not jurisdiction. **As amended, Dec. 12, 1884, p. 88, sec. 2.**

Taylor v. Woods, 52 Ala. 474; Burns v. Henry, 67 Ala. 209.

3. Of all actions of forcible entry and unlawful detainer.

4. Of all actions brought to recover specific property, when the value does not exceed one hundred dollars. **Ib. sec. 3.**

Carter v. Alford, 64 Ala. 236; Rodgers v. Gaines, 73 Ala. 218.

5. In such other cases as jurisdiction is, or may be given by law, not contrary to the constitution.

Remittitur of excess beyond jurisdiction.—King v. Dougherty, 2 Stew. 487; Nibbs v. Moody, 5 Stew. & Port. 198; Bentley v. Wright, 3 Ala. 607; Henderson v. Plumb, 18 Ala. 74; Crabtree v. Cliatt, 22 Ala. 181; Solomon v. Ross, 49 Ala. 198; Wharton v. King, 69 Ala. 198; Davis v. Bedsole, Ib. 362.

840 (758). **Authority.**—Every justice is a conservator of the peace within his county, and has authority therein,—

1. To administer oaths and take affidavits, except in those cases in which the power is expressly restricted to some other officer.

Bloodgood v. Smith, 14 Ala. 423; McCartney v. Bank, 3 Ala. 709.

2. To punish for contempt, by fine as high as six dollars, and by imprisonment, not exceeding six hours; one or both.

3. When the office of constable in his precinct is vacant, or in cases of emergency, to appoint a person to act in his place, without giving bond and surety, in the execution of all process, except the collection of executions.

Noles v. State, 24 Ala. 672; Brinsfield v. Austin, 39 Ala. 227; Solomon v. Ross, 49 Ala. 198.

4. To take the acknowledgment or probate of all deeds, or conveyances required to be recorded, and certify the same for registration.

5. To exercise such other powers as are, or may be conferred on him by law.

841 (759). **Duties.**—It is the duty of every justice of the peace,—

1. To keep a docket of all cases brought before him, in which must be entered the names of the parties, the return of the officer, and the entry of the judgment, specifying the amount of the same, and the day of its rendition.

Wyatt v. Judge, 7 Port. 37; Lightsey v. Harris, 20 Ala. 409.

2. To issue all process necessary to maintain his jurisdiction and enforce his authority, under such rules and regulations as are, or may be provided by law.

Kyle v. Evans, 3 Ala. 481.

3. To keep his office in the election precinct for which he is elected or appointed.

4. To pay over all moneys he may collect or receive, by virtue of his office, to the person entitled thereto, without delay.

Prewett v. Marsh, 1 Stew. & Port. 17; Lowrie v. Stewart, 8 Ala. 163; Spence v. Mitchell, 9 Ala. 744.

5. To perform such other duties as are, or may be required of him by law.

842 (760). **Removal from precinct vacates office.**—Justices of the peace vacate their offices by removing from their election precincts, and are liable to a penalty of forty dollars for acting as justice after such removal, to be recovered before any justice of the county in which such justice resides, by any one suing for the same; one-half to the use of the person suing for the same, and the other half to the use of the county.

ARTICLE II.

CONSTABLES.

843 (762). **Constables; election, term, etc.**—There is one constable for each election precinct in each county in the state, elected as hereinbefore prescribed, who holds office for four years, and until his successor is qualified.

844 (763). **Vacancy, how filled.**—Vacancies in the office of constable are supplied by appointment by the governor, and the person appointed holds office for the unexpired term, and until his successor is elected and qualified.

845 (301). **Notice of vacancy.**—When a vacancy in any election precinct is occasioned by the death, or removal from such precinct, of the constable thereof, notice thereof must be given to the judge of probate by the justice of such precinct residing the nearest to such constable, specifying the cause of such vacancy and the name of such constable; and the judge of probate must thereupon notify the governor.

846 (764). **Bond, etc.**—Before entering on the duties of his office, he must give bond, with surety, in the sum of one thousand dollars, conditioned and payable as prescribed by section 257 (163), which bond is to be approved by the judge of probate, and filed and recorded in his office.

Martin v. Hall, 72 Ala. 587.

847 (765). **Conservator of the peace.**—Every constable is a conservator of the peace within his county.

848 (766). **Duties.**—His duties are,—

1. To attend the terms of the circuit court of the county when summoned by the sheriff for that purpose.

2. To execute and return all summons, executions and other process, to them directed by any lawful authority.

3. To pay over moneys collected by virtue of his office to the person entitled thereto.

4. To attend the regular term of the justices' courts in his precinct.

5. To perform such other duties as are, or may be required of him by law.

849 (767). **Removal from precinct vacates office.**—He vacates his office by removal from the election precinct, and is liable to a penalty of forty dollars for acting as constable after such removal, to be recovered before any justice of the county in which he resides, by any person suing for the same; one-half to the use of such person, and the other half to the use of the county.

850 (768). **Justice appoints.**—When there is a vacancy in the office of constable, or when a constable is interested in a cause pending before a justice of the peace, the justice must appoint some suitable person to act as constable; and the person so appointed shall perform the same duties, and be liable to the same pains and penalties as the legally elected constable.

Street v. McClerkin, 77 Ala. 580.

851 (3653). **Liability of constable and sureties.**—The constable and sureties on his bond are responsible for moneys received by him, in virtue of his office, upon any summons, attachment, or execution issued by a justice, whether the same is received before or after judgment, or before or after the return day of the execution.

852. Advertisements by constables.—Unless otherwise expressly provided, all advertisements and notices of the levy of any process, or of the sale of any property under process, required by law to be made by constables, shall be made by posting written notices at three public places in the precinct where the property levied on is required to be sold; and when the court-house is in such precinct, one of such notices shall be posted thereat.* Dec. 3, 1878, p. 162.

CHAPTER 9.

ATTORNEYS.

853 (780). **Who may practice as attorneys.**—Only such persons as are regularly licensed have authority to practice law.

854 (781). **Extent of license.**—Those who have been regularly licensed can practice only in such courts as their license may authorize; those admitted to the supreme court may practice in all the courts in this state; and those admitted by any chancery, city, or circuit court may practice in any court in the state except the supreme court.

Ex parte Dorsey, 7 Port. 293; Withers v. State, 36 Ala. 252; Cousins v. State, 50 Ala. 113.

855 (782). **Who may be licensed.**—Any man of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, is entitled to admission to practice in any or all the courts of this state.†

856 (783). **Application for license.**—For the purpose of ad-

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* The chapter on Solicitors transposed to Criminal Code.

† "Male" changed to "man" by joint committee.

mission, he must apply to the supreme court, the court of chancery, or the circuit, or city court, and must show,—

1. That he is of the age twenty-one years, which proof may be made by his own affidavit.

2. That he is of good moral character, which may be proved by certificate, or other evidence satisfactory to the court.

857 (784). **Examination of applicant.**—The applicant must be examined in open court touching his knowledge,—

1. Of the law of real property.
2. Of the law of personal property.
3. Of the law of pleading and evidence.
4. Of the commercial law.
5. Of the criminal law.
6. Of chancery and chancery pleading.
7. Of the statute laws of the state.

858 (785). **Order of admission.**—If, on examination, the applicant is found duly qualified in all the branches specified in the preceding section, the court must direct an order to be entered, that the applicant is of the age of twenty-one years, of good moral character, and possesses the requisite qualifications of learning and ability to practice in the several courts of this state, in which his license entitles him; and upon the entry of such order, obtaining his license, and taking the oath hereinafter prescribed, he is entitled to practice accordingly.

859 (786). **Minors may be licensed.**—The court of chancery, or the circuit or city court may license minors, if possessing the maturity, character and attainments requisite; but the minors so licensed shall be precluded from pleading infancy in any civil proceeding against them.

860 (787). **Supreme court may appoint committee.**—The supreme court may, at its discretion, appoint a committee of three members of its bar to examine an applicant for license, either privately or in open court, and must grant or refuse license according to the report of such committee.

861 (788). **Oath of attorney.**—Every attorney, before commencing practice, must take an oath to support the constitution of this state, and of the United States, and not to violate the duties enjoined on him by law; which oath must be filed in the office of the clerk or register of the court by which he is licensed.

862 (789). **Penalty for practicing before oath.**—If any attorney commences practice before taking and filing the oath prescribed by the preceding section, he forfeits the sum of two hundred dollars; one-half to the use of the person suing for the same, and the other to the use of the state.

863 (790). **Party may manage his own cause.**—Any person may, however, conduct and manage his own case in any court in this state.

864 (791). **Duties of attorneys.**—It is the duty of attorneys,—

1. To support the constitution and laws of this state, and of the United States.

2. To maintain the respect due to courts of justice and judicial officers.

3. To employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth;

and never to seek to mislead the judges by any artifice, or false statement of the law.

4. To maintain inviolate the confidence, and, at every peril to themselves, to preserve the secrets of their clients.

5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party, or a witness, unless required by the justice of the cause with which they are charged.

6. To encourage neither the commencement nor continuance of an action or proceeding from any motives of passion or interest.

7. Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed.

865 (792, 794). **Officers and deputies disqualified from practicing.**—The sheriff, or deputy of the sheriff, must not practice law; the clerk of the circuit or city court, or the deputy of the clerk, must not practice in the court of which he is clerk or deputy; the register in chancery, or the deputy of the register, must not practice in the court of which he is register or deputy; the clerk of the judge of probate must not practice in the court of which his principal is the judge.

866 (796). **Authority of attorneys in cause.**—An attorney has authority to bind his client, in any action or proceeding, by any agreement in relation to such cause, made in writing, or by an entry to be made on the minutes of the court.

Norman v. Burns, 67 Ala. 248.

867 (797). **Proceedings on appearance without authority.** If it be alleged by a party for whom an attorney appears, that he does so without authority, the court may, at any stage of the proceedings, upon proof of the allegation, relieve the party for whom the attorney has assumed to appear from the consequences of his acts.

868 (798). **Proof of authority; when required; how made.** The court or judge may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for one of the several adverse parties, to produce or prove the authority under which he appears; and, until he does so, may stay all proceedings by him on behalf of the party for whom he assumes to appear; but the oath of the attorney is presumptive evidence of his authority.

Brewer v. Watson, 71 Ala. 299.

869 (799). **Causes of removal of attorney.**—An attorney must be removed for the following causes by the circuit court:

1. Upon his being convicted of a felony other than manslaughter, or of a misdemeanor involving moral turpitude; in either of which cases the record of his conviction is conclusive evidence.

2. When any judgment is rendered against him, for money collected by him as an attorney, upon which judgment an execution has issued, and been returned no property; in which case the record of the judgment and execution is conclusive evidence.

870 (800). **Other causes of removal or suspension.**—For the following causes he may be removed or suspended:

1. Upon its being shown, to the satisfaction of the court, that

he has been guilty of any deceit or willful misconduct in his profession.

2. For a willful disobedience or violation of the order of a court, requiring him to do or forbear an act connected with, or in the course of his profession.

3. For a willful violation of any of the provisions of section 864 (791).

Withers v. State, 36 Ala. 252; Thomas v. State, 58 Ala. 365.

871 (801). **At whose instance.**—The proceedings to remove or suspend an attorney, as provided for in the last two sections, may be taken by the court of its own motion, or upon the motion of any third party.

Jan. 22, 188 , p. 94.

872. State Bar Association may institute proceedings. The Alabama State Bar Association has authority to institute and prosecute, in its own name, the proceedings herein prescribed for the removal or suspension of an attorney.

873 (802). **Charge to be in writing.**—The accusation must be in writing, and when the proceeding is taken by the court, it may be drawn up by the solicitor, or the clerk, under the direction of the court.

874 (803). **Charge to be sworn to.**—If the proceedings are upon the information of another, the accusation must be verified by the oath of the person making it, or some other person, and presented to the court.

875 (804). **Attorney cited to answer.**—The court must then, if of opinion that the accusation would, if true, be grounds of removal or suspension, make an order requiring the accused to appear and answer the same, at a specified day during that, or the next term; and must cause a copy of the order and accusation to be served on the accused, within a prescribed time before the day appointed in the order.

876 (805). **In default of appearance, charge examined, etc.** The accused must appear at the time appointed in the order, and answer the accusation, unless, for sufficient cause, the court assigns another day for that purpose; if he does not appear, the court may proceed and determine the accusation in his absence.

877 (806). **Answer.**—The accused may answer, either by objecting to the sufficiency of the accusation or by denying its truth, either of which must be entered on the minutes.

878 (807). **Answer after demurrer overruled.**—If the objection to the sufficiency of the accusation be not sustained, the accused must answer it forthwith.

879 (808). **How tried; accused may demand jury.**—If he pleads guilty, or refuses to answer the accusation, the court must proceed to judgment of removal or suspension; if he deny the accusation, the court must immediately, or at such time as it may appoint, proceed to try the same, the accused having a right to demand a trial by jury.

880 (809). **Appeal taken to supreme court.**—A judgment of acquittal is final, but from a judgment of removal or suspension the accused may appeal to the supreme court, at any time within thirty days after judgment.

881 (810). **In whose name conducted.**—The proceedings, when instituted by the court of its own motion, are conducted in the name of the state, the solicitor appearing to sustain the

accusation; and when on the information of another, in the name of the state, on the information of such person.

882 (811). **Testimony, how taken; security for costs.** Either party has a right to subpœnas and other process to compel the attendance of witnesses; and testimony may be taken by deposition in such cases, and in the same manner as in actions at law; and the court may, in its discretion, require the informant to give security for costs; and, failing so to do within the time prescribed, the proceedings must be dismissed at the cost of the informant.

883 (812). **Payment of costs, and judgment therefor.** When the proceedings are in the name of the state, the costs are paid as in criminal cases; when in the name of the state, on the information of another, if the accusation is not sustained, judgment is rendered against the informant, and his surety for costs, if the same has been given; but if the accusation is sustained, judgment for costs must be rendered against the accused.

884 (813). **Proceedings on death of informant.**—Upon the death of the informant, if there be but one, the proceedings abate, unless some other person is substituted in his place, which may be done on application to the court. If there be more than one informant, the proceedings continue on the information of the survivor.

885 (814). **When attorneys of other states may practice.** Attorneys at law residing in other states, having a license to practice law therein, may practice in any of the courts of this state, when by law the attorneys of this state are permitted to practice law in such state; and such attorneys, when practicing in the courts of this state, are subject to all the rules and regulations prescribed in this chapter.

TITLE X.

COUNTY ORGANIZATION.

CHAPTER 1.—Incorporation of counties; deeds, contracts and agreements for the benefit of; county property and county claims.

2.—County treasurer.

3.—Coroner.

4.—County surveyors.

CHAPTER 1.

INCORPORATION OF COUNTIES; DEEDS, CONTRACTS AND AGREEMENTS FOR THE BENEFIT OF; COUNTY PROPERTY AND COUNTY CLAIMS.

886 (815). **County a body corporate.**—Every county is a body corporate, with power to sue or be sued in any court of record.

Autauga v. Davis, 32 Ala. 703; Marshall v. Jackson, 36 Ala. 613; Covington v. Kinney, 45 Ala. 176; Montgomery v. Barber, Ib. 237; Commissioners v. Moore 53 Ala. 25; Chambers v. Lee, 55 Ala. 534; Marengo v. Coleman, Ib. 605; Simpson v. Lauderdale, 56 Ala. 64.

887 (816). **Deeds to others for use of county.**—All deeds, grants, or conveyances, made to any officer or person for the use and benefit of the county, vest in such county the title as fully as if made to such county by name.

888 (817). **Commissioners have custody of property, and may sell.**—The court of county commissioners have the control of all property belonging to the county, and may, by an order to be entered on its minutes, direct the disposal of any real property which can be lawfully disposed of, and appoint a commissioner to make titles thereto; and the conveyance of such commissioner, in accordance with such order, invests the grantee with the title of the county.

889 (818). **County buildings erected and repaired by county.**—The county buildings are to be erected, and kept in order and repair at the expense of the county, under the direction of the court of county commissioners, which court is authorized to make all necessary contracts for that purpose.

890 (819). **Sheriff has charge of court-house, etc.**—The sheriff has charge of the court-house, and must prevent trespasses, keep out intruders, and keep it and the ground attached thereto in order; reporting, from time to time, the repairs required to the court of county commissioners.

891 (820). **Erection of county buildings.**—It is the duty of the court of county commissioners of each county to erect a court-house, jail, and other necessary county buildings; and such court has authority to levy a special tax for that purpose.

892 (821). **County jail; how constructed and arranged.** The county jail must be of sufficient size and strength to contain and keep securely the prisoners which may be confined therein; and must contain at least four apartments, properly ventilated, so as to secure the health of those confined therein; one for white men, one for white women, one for colored men, and one for colored women.*

893 (822). **Tax for building or repairing jail; proposals for same.**—It is the duty of the court of county commissioners of each county, if there is not a sufficient jail in their county, to levy a county tax for the erection thereof, and cause proposals to be issued for building or repairing the same, within twelve months thereafter.

894 (823). **Special tax for court-house or jail; disposition of surplus.**—Whenever it shall be deemed necessary by the court of county commissioners of any county in this state to build a new court-house or jail for such county, or to repair those already built, such court shall have the power and authority to levy and collect a special tax upon the taxable property of such county, not to exceed in any one year one-half of one per centum, for such purposes; and such tax, when collected, shall be used exclusively for the purposes herein indicated; but should any greater fund be raised by such tax than is needed for the purpose for which it was levied, such balance, after the building

* "Men" for "males" and "women" for "females," substituted by joint committee.

and repairs hereinbefore set forth shall have been paid for, shall go into the fund for compromising the debt of such county, or in case it be not needed for such purpose, shall be turned over to the treasury, and become a part of the common fund of the county.

895 (824). **Special tax; how levied.**—In all cases in which the commissioners court of any county is directed or empowered to levy a special tax for county purposes, such levy shall be made by the court itself, upon the assessment last made for state taxes.

896. Special appropriation for heating jail, etc.—It is the duty of the court to make special appropriations for heating the county jail in cold weather, for supplying it with wholesome water for drinking and bathing, to keep it in a cleanly condition and free from offensive odors, and for providing it with necessary vaults, water-closets and dry earth. Dec. 6, 1880, p. 129.

897. Special term for making such appropriations.—If there be a necessity, and delay until a regular term of the court may be of injury to the health of the prisoners, it is the duty of the judge of probate to appoint a day for the meeting of the court, of which, if practicable, five days' notice must be given to each commissioner, which notice must be in writing, signed by the judge, and must be served by the sheriff. Ib.

898. Duty of court at such special term.—Upon assembling, it is the duty of the court of county commissioners to make an appropriation of such an amount as is necessary for the purposes expressed in the second preceding section, and for the payment thereof must order the issue of a warrant payable to the sheriff, which must be paid by the county treasurer on the presentment thereof in preference and priority of all other claims. Ib.

899. Duty of sheriff.—The appropriation having been made, and the sheriff having received payment thereof, it is his duty, so far as such appropriation will enable him, to keep the jail supplied with wholesome water for drinking and bathing, to keep drinking water accessible at all times to each prisoner, to keep it comfortably warm in cold weather, at all times cleanly and free from offensive odors, and provided with necessary vaults, or water-closets, or dry earth for the use of prisoners. Ib.

900. Examination of jail.—It is the duty of the judge of probate and clerk of the circuit court, once each week, without informing the sheriff or jailer of the time when such visit will be made, to visit and examine the condition of the jail, and make a memorandum in writing of such examination, and report under oath such examination to the grand jury. Ib.

901 (826). **Auditing and registry of claims; how paid.** The court of county commissioners must, in term time, audit all claims against their respective counties; and every claim, or such part thereof as is allowed, must be registered in a book kept for that purpose; and the judge of probate must give the claimant a warrant on the treasury for the amount so allowed.

Van Epps v. Commissioners, 25 Ala. 460; Mitchell v. Tallapoosa, 30 Ala. 130; Autauga v. Davis, 32 Ala. 613; Marshall v. Jackson, 36 Ala. 613; Barbour v. Horn, 41 Ala. 114; Montgomery v. Barber, 45 Ala. 237; Dale v. Gunter, 46 Ala. 118; Lowndes v. Hunter, 49 Ala. 507; Palmer v. Fitts, 51 Ala 489; Vincent v. Gilmer, Ib. 387; Commissioners v. Moore, 53 Ala. 25; Shinbone v. Randolph, 56 Ala. 183; Speed v. Cocke, 57 Ala. 209; Henry v. Cohen, 66 Ala. 382; Jack v. Moore, Ib. 184; State v. Brewer, 64 Ala. 287.

902 (827). **Claims must be itemized, proved, entered and filed.**—No claim against the county shall be passed upon or allowed by the court of county commissioners, unless it is itemized and sworn to by the claimant, or some person in his behalf having personal knowledge of the facts; and all claims passed upon and allowed, according to this section, must be entered in the order in which they were allowed, in a book kept for that purpose, and filed for future reference, within two weeks after the term at which such allowances were made; and the testimony required in the allowance of a claim must show whether or not any part thereof has been previously paid.

Schroeder v. Colbert, 66 Ala. 137.

903 (828). **Claim by executor, etc.**—When a claim is filed by an executor, administrator, guardian, or trustee, it may be verified by the affidavit of such executor, administrator, guardian, or trustee, that he believes the claim to be just, due and unpaid.

904 (831). **Withdrawal of claim.**—If a claim is rejected, or not allowed in full, the claimant may withdraw the same.

905 (832). **Claims barred if not presented.**—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability.

Michael v. Marengo, 52 Ala. 159; Marengo v. Coleman, 55 Ala. 605.

906 (833). **When barred if records burnt.**—Claims against a county in which the records have been destroyed by fire, are barred if not registered in the proper office of the county within twelve months.

Jan. 17, 1879, p. 166.

907. Lights and fuel furnished courts.—It is the duty of the sheriff to furnish the circuit, city and chancery courts and court of county commissioners, necessary lights and fuel during their sessions, and therefor the court of county commissioners must, upon the presentation of an account by him, properly verified, make to him reasonable compensation; and for the amount allowed, the judge of probate must draw a warrant on the treasury of the county.

908. Preferred claims.—The claims of grand and petit jurors for compensation, as shown by the certificates issued to them; the compensation of the members of the court of county commissioners, as shown by the certificates issued to them; and the accounts for necessary stationery furnished the county, are to be preferred in payment to all other claims, except special appropriations for the county jail provided for under sections 896 and 898, which have priority of all other claims; and for the payment thereof it is the duty of the county treasurer to set apart a sufficient fund from the moneys of the county. Claims for the support of the poor are to be next preferred; and thereafter a claim for the use of a building for a court-house, the county not having a suitable building, is to be preferred; and thereafter the claim of the secretary of state for certified copies of field notes is to be preferred.

Euloe v. Reike, 56 Ala. 500; Henry v. Cohen, 66 Ala. 382.

909. County indebtedness may be funded.—The court of county commissioners, if they deem it necessary, may, without

increasing the indebtedness of the county, settle, or compromise and fund the debt of the county existing at the ratification of the Constitution of 1875, and for the payment thereof may issue the bonds of the county, not running for a longer time than thirty years, nor bearing an annual interest exceeding six per cent.; and, for the payment of the principal and interest of such bonds, may levy annually a special tax on the value of the taxable property of the county, as assessed for state taxation, not exceeding one-fourth of one per centum, which must be collected as state and county taxes are collected, and which must be applied exclusively to the payment of the principal and interest of such bonds.

CHAPTER 2.

COUNTY TREASURER.

910 (841). **Election and term of office.**—A county treasurer is elected by the qualified voters of the county, and holds his office for four years, and until his successor is elected and qualified.

911 (842). **Official bond.**—The county treasurer must give bond, with two sureties, in double of the estimated amount of the county revenue, to be determined by the court of county commissioners, payable to the county, and conditioned to discharge the duties of his office during the time he may continue in office, or discharge any of the duties thereof; which bond is to be approved by the judge of probate, and filed and recorded in his office.

Townsend v. Everett, 4 Ala. 607; Douglass v. Terrell, 11 Ala. 583; Wilson v. Cantrell, 19 Ala. 642; Taylor v. State, 31 Ala. 383; Moore v. Madison, 38 Ala. 670; Morrow v. Wood, 56 Ala. 1; Caldwell v. Dunklin, 65 Ala. 461; Lewis v. Lee, 66 Ala. 480; s. c., 73 Ala. 148; Boothe v. King, 71 Ala. 497; Cohen v. Coleman, Ib. 497.

912 (843). **Failure to give bond vacates office.**—If any county treasurer fails to give bond within ten days after the declaration of his election, or after his appointment, his office is vacated.

913. Vacancy in office.—If the office becomes vacant by the failure of the treasurer elected or appointed to give bond, or by his death, resignation, or removal, the court of county commissioners must fill the vacancy by appointment; and the person so appointed shall hold office until his successor is elected and qualified.

914 (844). **Oath of office.**—The treasurer must, before entering on his duties, take an oath to discharge the duties of the office to the best of his ability, so long as he continues to discharge any of the duties thereof; which oath must be filed with his bond.

915 (845). **Duties.**—It is the duty of the county treasurer,—

1. To receive and keep the money of the county, and disburse the same according to law.

2. To register, according to the forms herein prescribed, in well-bound books, all claims allowed by the court of county commissioners, and presented to him; designating the date of

the allowance, when presented, the character of the claim, to whom allowed, and the amount.

3. To number, register and pay all claims in the order in which they are presented, and on payment take a receipt for the same, and mark on the register the word "paid" against the same, except petit and grand jury certificates, which shall be paid on presentation, without being audited, examined and allowed by the county commissioners, and numbered and registered as other claims; and that all witness certificates in criminal cases shall be paid as now provided for by law, without being audited, examined and allowed by the court of county commissioners.

4. When any claim against the fine and forfeiture fund, or general fund is paid into the treasury, or is received in such treasury, to cancel the same by defacing or mutilating it so as to show that it is of no further value.

5. To keep a correct account of the receipts and disbursements of all money received by him for the county, according to the forms herein prescribed, charging himself with all moneys so received, of whom, on what account, and the amount, and crediting himself with all payments, stating the number and character of the claim, in whose favor, and the amount.

6. To examine the dockets of the circuit and city courts, and sheriff semi-annually; to demand and receive all moneys due to the county, and to institute proceedings against defaulters.

7. To submit to the court of county commissioners, at the first term in each year, the register of claims; his account for the year balanced; vouchers for the payments; an estimate of the indebtedness of the county for the coming year, and the means of providing for the same.

8. To make reports, and give information to the court of county commissioners, when required, respecting all matters relating to the finances of the county.

9. To furnish the probate judge, in January of each and every year, a verified statement of all moneys received by him for the county during the preceding year, and of all claims received by him in lieu of money, which are receivable in payment of county taxes, which statement must designate the time and person from whom such moneys or claims were received.

10. To keep his office within one mile of the court-house of the county.

11. To perform such other duties as are, or may be by law required of him.

Edmondson v. DeKalb, 51 Ala. 103; Barnes v. Hudman, 57 Ala. 504; State v. Stone, 69 Ala. 206.

916 (846). **Who incompetent to act.**—No person can hold the office of county treasurer and judge of probate, county commissioner, sheriff, clerk of the circuit court, tax-collector, assessor, or either of such offices, at the same time.

917 (847). **Books.**—The books of the county treasurer are to be provided at the expense of the county.

918 (848). **Annual account recorded.**—The annual account of the county treasurer, when examined and approved by the court of county commissioners, must be recorded, and a copy of the same posted at the court-house door.

919 (849). **Committee to examine books and vouchers.** The judge of probate must each year appoint three persons to examine the books and vouchers of the county treasurer, and report the condition of the same.

Lewis v. Lee County, 73 Ala. 148.

920 (850). **Proceedings on death, or termination of office.** In case of the resignation, expiration of his term, or removal from office, the county treasurer, or if he is dead, his personal representatives, must state his account, and deliver all the money, books, papers and property of the county to his successor, who must report the same to the term of the court of county commissioners held next thereafter, and if satisfied that such account is correct, and that all the money, books, papers and property of the county have been delivered to such successor, such court must cause an entry thereof to be made of record.

921 (851). **Compensation.**—The county treasurer receives such compensation as may be allowed by the court of county commissioners, in no case exceeding five per cent. on the money paid out by him; nor in any case exceeding the aggregate sum of one thousand dollars in any one year.

Barbour County v. Clark, 50 Ala. 416.

922 (851). **Form of accounts.**

Register of Claims against Montgomery County.

WHEN ALLOWED.	WHEN FILED.	CHARACTER OF CLAIM.	NO.	IN WHOSE FAVOR.	AMOUNT.	REMARKS.
1 October, 1886.	2 October, 1886.	Jail repairs.	1	A. B.....	$43 25	Paid 2 October, '86
4 June, 1886.	1 November, '86	Jury certificates.	2	C. D.....	6 00	Paid 1 January, '87

A. B., Treasurer, in Account Current with Montgomery County.

To Cash Received,			Dr.	By Cash Paid Out,				Cr.
OF WHOM RECEIV'D.	ON WHAT ACCOUNT.	WHEN RECEIVED.	AMOUNT.	NO.	WHEN FILED.	CHARACTER OF CLAIM.	IN WHOSE FAVOR.	AM'T.
G. H.....	Taxes for '86.	10 Dec., '86.	$2,276 50	1	2 Oct., '86	Jail repairs.....	A. B.....	$43 25
L. M.....	Licenses.....	4 January, '87	143 00	2	1 Nov., '86	Jury certificates..	C. D.....	6 00

CHAPTER 3.

CORONER.

923 (852). **Election and term of office.**—A coroner for each county is elected by the qualified electors thereof, who holds his office for four years, and until his successor is elected and qualified.

924 (853). **Bond; oath; failure to give bond vacates office.**—The coroner must give bond in the sum of two thousand dollars, payable and conditioned according to the provisions of section 257 (163), which bond is to be approved by the judge of probate, and must be filed and recorded in his office; and he

must also take the oath prescribed by the constitution. If he fails to give bond within ten days after he is declared elected, he vacates his office.

925 (854). **Duty to hold inquests.**—It is the general duty of the coroner to hold inquests, and perform other duties as required by law.

926 (855). **When to discharge duties of jailer.**—The coroner is keeper of the jail when the sheriff is imprisoned.

927 (856). **When to discharge duties of sheriff.**—He must discharge the duties of the sheriff,—

1. When the office of sheriff is vacant, and until his successor is qualified.
2. When the sheriff is imprisoned.
3. In cases to which the sheriff is a party.
4. In such cases as he is directed by the judge of probate.

928 (857). **When sheriff interested, coroner acts.**—When the sheriff is interested in any cause or proceeding, such interest not appearing on the face thereof, the judge of probate may, on a proper showing by affidavit, direct the coroner to execute the summons, writ, or other process, in such cause or proceeding.

929 (858). **Special coroner; when and by whom appointed.** The judge of probate has authority to appoint a special coroner,—

1. When the coroner has not qualified or the office is vacant, and the emergency requires such officer.
2. When the coroner is absent from the county, having no deputy therein.
3. When the coroner is imprisoned.
4. When the sheriff and coroner are both parties, or both interested.

930 (859). **Duties of special coroner.**—A special coroner must discharge the duties of sheriff in such cases as the coroner is required, and also when the sheriff and coroner are imprisoned, and, on the direction of the judge of probate, when they are both parties, or both interested.

931 (860). **Additional bond; failure to give vacates office; vacancy certified.**—When the coroner is required to discharge the duties of sheriff, the judge of probate may, in his discretion, require him to give an additional bond. If the coroner fails, for ten days after such requisition, to give such additional bond, his office is vacated, and the judge of probate must certify the vacancy to the governor.

932 (861). **Liability for neglect of duty.**—For the failure to perform any duty, or the improper or neglectful performance of such duty, or for any wrongful act committed under color of office by the coroner, or the special coroner, while discharging the duties of sheriff, such coroner and his sureties, and such special coroner, are liable to the same penalties, forfeitures and judgments given by law against sheriffs in like cases, to and upon the same proceedings and remedies as are given by law against sheriffs and their sureties.

CHAPTER 4.

COUNTY SURVEYORS.

933 (862). **Number; appointment; term of office.**—The court of county commissioners is authorized to appoint two surveyors for the county, who hold office for the term of three years, and until their successors may be qualified, unless sooner removed. Before making an appointment, the court must be satisfied by evidence that the person appointed is qualified to discharge the duties of a surveyor. As amended, Feb. 13, 1879, p. 61, sec. 1.

934 (863). **Removal from office.**—The court has power to remove either or both such surveyors, if satisfied the public good requires removal, and in the event of removal, to make a new appointment. Ib. sec. 2.

935 (864). **Oath of office; official bond.**—Before entering on his duties, the surveyor must take before the judge of probate the constitutional oath, which must be filed in the office of the judge; and the surveyor must give bond with sufficient sureties, in the penalty of five hundred dollars, payable to the State of Alabama, with condition to discharge faithfully the duties of the office so long as he continues therein, or discharges any of the duties thereof. The bond must be taken and approved by the judge of probate, and filed and recorded in his office. Ib. sec. 3.

936 (865). **Duties.**—It is the duty of the surveyor faithfully to execute and return all orders of survey directed to him from any court of record in the state, and make all surveys of lands or lots in the county, at the request of any person interested therein, on payment or tender of his probable fees for the same.

937 (866). **Chain-bearers, etc.**—He must swear his chain-bearers to perform their duties without favor or affection; must make a plat of all lands or lots he surveys, for the person requiring the same; and write on such plat the names of his chain-bearers, and also his fees for the same.

938 (867). **When fees taxed as costs.**—When a survey is directed by any court of record, the fees of the surveyor are to be taxed in the bill of costs.

939 (868). **Plat of survey evidence when notice given.** A survey or plat of land made by a county surveyor, signed by him officially, and stating the contents, courses, distances and designation at the land-office, of any land surveyed by him, is presumptive evidence of the facts stated, if the opposite party has notice that such survey is to be made.

Nolin v. Parmer, 21 Ala. 66; Bridges v. McClendon, 56 Ala. 327; Clements v. Pearce, 63 Ala. 284.

940 (869). **Liability.**—A county surveyor is liable, on his official bond, for any damages done by a wrongful survey or plat.

941 (870). **Compensation.**—The court of county commissioners must fix his rates of compensation, as well as that of his chain-bearers and markers.

942 (871). **Fences on section line.**—When a resurvey of land is made by a county surveyor for the purpose of straight-

ening section lines, or any subdivision lines of sections, the owners of fences built on the original lines shall not lose their rights to the same, when the resurvey changes the original lines, and places the fences on the land of others.

TITLE XI.

EDUCATION.

CHAPTER 1.—Public school fund.
2.—Officers.
3.—Public schools.
4.—Apportionment and disbursement of school funds.
5.—School lands.
6.—University of Alabama.
7.—Agricultural and Mechanical College of Alabama.
8.—School for the Deaf and Dumb and the Blind.

CHAPTER 1.

PUBLIC SCHOOL FUND.*

Feb. 17, 1879, p 117, sec. 1.

943. Appropriations for public schools.—For the maintenance of a system of public schools throughout the state, the following sums of money are hereby appropriated for each scholastic year, to-wit:

1. The annual interest at six per cent. on all sums of money which have heretofore been, or which may hereafter be received by the state, as the proceeds of sales of lands granted or entrusted by the United States to the state, or to the several townships thereof, for school purposes.

2. The annual interest at four per cent. on that part of the surplus revenue of the United States, deposited with the state under the act of congress approved June 23, 1836.

3. All the annual rents, incomes and profits, or interests, arising from the proceeds of sales of all such lands as may hereafter be given by the United States, or by this state, or by individuals, for the support of the public schools of the state.

4. All such sums as may accrue to the state as escheats; the same to be applied to the support of the public schools during the scholastic year next succeeding their receipt in the state treasury.

* On February 28, 1887, an act was approved amending "An act to organize and regulate a system of public instruction for the State of Alabama, approved February 7, 1879, and the amendments thereto." — See Pamph. Acts 1886–'7, p. 117. The provisions of the statutes affected by this amendment are mainly incorporated in this title; some of them, relating to the collection of the poll-tax, and settlements therefor by the tax-collector, are incorporated in the title on Taxation.

5. The further sum of two hundred and fifty thousand dollars, from any money in the treasury not otherwise appropriated.

6. The net amount of poll-tax that may be collected in the state; the poll-tax collected in each county to be retained therein for the support of the public schools thereof, and distributed and disbursed as provided in this title.

7. All rents, incomes and profits received into the state treasury during the scholastic year from all lands heretofore donated by the congress of the United States for the support of the public schools, and remaining unsold, which shall be applied to the support of the public schools during the scholastic year next succeeding their receipt into the treasury.

8. Licenses which are by law required to be paid into the school fund of any county; to be promptly paid by the judge of probate, or other person collecting the same, to the county superintendent of education, and to be expended for the benefit of the public schools in such county.

944. When appropriations accrue, and placed to credit of educational fund.—All such appropriations, except the poll-tax, shall accrue to the educational fund on the first day of October, in each year; and on that day the state auditor shall place to the credit of that fund, on the books in his office, all such amounts as accrue thereto from the sources in this chapter mentioned, except the poll-tax, for the scholastic year beginning on that day. Ib. sec. 2.

CHAPTER 2.

OFFICERS.

ARTICLE 1.—General designation.
2.—Superintendent of education.
3.—County superintendents.
4.—Township superintendents.

ARTICLE I.

GENERAL DESIGNATION OF OFFICERS.

945. Officers for administration of public schools.—For the administration and government of public schools in this state, there are the following officers: Feb. 7, 1879, p. 117, sec. 4.

1. The superintendent of education.
2. A county superintendent of education in each county.
3. A township superintendent of public schools in each township, or other school district.

ARTICLE II.

SUPERINTENDENT OF EDUCATION.

946. Commission, term of office, and salary.—The superintendent of education, after his election, shall be commissioned by the governor, shall hold his office for the term of two years, and until his successor is elected and qualified, and shall receive a Ib. secs. 5, 11, as amended March 1, 1881, p. 67.

salary of two thousand two hundred and fifty dollars per annum, payable in monthly installments, on the last day of each month.

Ib. sec. 5.

947. Oath of office and bond.—Before entering upon the duties of his office, he shall take the oath of office prescribed by the constitution, and shall also give bond, with sureties to be approved by the governor, in the sum of fifteen thousand dollars, conditioned faithfully to discharge the duties of his office so long as he shall remain therein, or perform any of the duties thereof; and such bond shall be filed in the office of the secretary of state.

Ib. sec. 9.

948. Office and books, papers and records.—He shall have an office at the capitol of the state, where the bonds, papers and records of his office shall be kept, and where he shall give attendance when not absent on official business; and it shall be the privilege of all persons interested to have access, at all proper hours, to the books, papers and records of the office.

Ib. sec. 10, as amended, March 1, 1881, p. 67.

949. Clerk, and his salary.—He is authorized to employ a suitable clerk for services in his office; and such clerk shall be allowed an annual salary of fifteen hundred dollars, to be paid as the salaries of other department clerks are paid.

Ib. sec. 7.

950. Duties of superintendent of education.—The duties of the superintendent of education shall be as follows:

1. He shall devote his time to the care and improvement of the common schools, and the promotion of public education, and shall exercise a general supervision over all the educational interests of the state; and to this end, he shall have power to require from the county superintendents of education, township superintendents of public schools, and all other school officers, all such reports and information relating to the educational fund, or the condition of the schools and the management thereof, as he may deem important, or as may be prescribed by law; and he may remove from office any such officer for failure to make such report, give such information, or discharge any other official duty.

2. He shall annually, as far as practicable, visit every county in the state for the purpose of inspecting the schools and their management, the accounts of county superintendents of education and other school officers, and for diffusing as widely as possible, by personal addresses and personal communication, information as to the importance of public schools and the best possible method for their management; and he shall encourage and assist at organizing and conducting teachers' and superintendents' institutes.

Feb. 10, 1885, p. 113, sec. 1.

3. He shall make provision for instructing all pupils in all schools and colleges supported, in whole or in part, by public money, or under state control, in hygiene and physiology, with special reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system.

4. He shall annually apportion and distribute all money belonging to the educational fund, in such manner as may be prescribed by law, and shall see to the proper disbursement of the same; and to this end, he shall keep an accurate account with all officers who may be custodians or disbursers of the school fund, or any part thereof.

5. He shall prepare all forms, and have printed and distributed all such blanks as may be necessary, or as may be required by law, in the administration of the public school

system; such printing and distribution to be done at as cheap a rate as possible, and to be paid for out of the educational contingent fund.

6. He shall furnish the county superintendents of education and other school officers all necessary books for keeping their accounts and records, to be paid for out of the educational contingent fund, and to be and remain public property; and he shall prescribe a uniform system of keeping such accounts and records.

7. He shall take receipts for all such books so furnished by him to school officers, and such officers shall take good care thereof, and turn them over to their successors in office.

8. He shall keep a debtor and creditor account with each township, or other school district, in the state, of all funds accruing thereto for educational purposes.

9. He shall keep an accurate account of the capital of all sixteenth section or other trust funds, to which each township or school district may be entitled, showing whence and when such funds were derived.

10. He shall preserve in his office all bonds of school officers and others required to be filed therein.

11. He shall cause suits to be instituted and prosecuted against all defaulters to the educational fund, and for this purpose may employ attorneys; but he shall not have power to contract to pay such attorneys out of the educational fund more than ten per centum of the amount recovered by them in such suits; and out of such fund he may pay such lawful costs as may be taxed against him as superintendent of education, in case he is cast in any of such suits.

12. He shall require and supervise the collection of all poll-taxes. March 1, 1881, p. 8, sec. 2.

13. He shall, by correspondence, exchange of official reports, and other proper means, elicit information relative to the system of public education in other states and countries, and disseminate all useful knowledge regarding the same among the county superintendents and other school officers in the state.

14. He shall collect in his office such school books, apparatus, maps, charts and specimens of improved school furniture as can be obtained without expense to the state.

15. He shall prepare and have printed, in pamphlet form by the public printer, all laws, rules and regulations pertaining to the public school system of the state, and cause the same to be distributed among the county superintendents of education, and other officers connected with the school system, for the information of those interested in the educational interests of the state.

16. He shall perform such other duties as are, or may be prescribed by law.

951. Report to governor; contents.—He shall also, as soon as practicable after the close of each scholastic year, report to the governor in writing,— Feb. 7, 1879, p. 117, sec. 8.

1. A brief history of his labors.

2. An abstract of the reports received by him from the county superintendents of education, exhibiting the condition of the public schools.

3. Estimates and accounts of expenditures of school money.

4. An itemized statement, showing how the contingent fund of his department, and all other special funds or appropriations under his control have been disposed of.

5. Such recommendations as he may desire to make for the improvement of the school system, and the care and increase of the educational fund.

6. All such other matters relating to his office and to the public schools, as he shall deem expedient to communicate.

Ib. sec. 8. **952. Report to be printed and distributed.**—The governor shall, when such report is laid before him, direct the superintendent of education to have printed in the same manner, and upon the same conditions as other printing is done, during the recess of the general assembly, a sufficient number of copies of the report to supply the county superintendents and township superintendents of public schools, and other school officers, and for the usual exchange with other states, and with the leading cities of the United States; and it shall be the duty of the superintendent of education to distribute the same as indicated in this section.

Ib. sec. 6. **953. Vacancy filled by governor; term, etc., of appointee.** If the office of superintendent of education should, at any time, become vacant, by death, resignation, or otherwise, the governor shall appoint a suitable person to fill such office for the unexpired term; and such appointee shall give bond and qualify in the same manner as if he had been elected for a full term.

ARTICLE III.

COUNTY SUPERINTENDENT OF EDUCATION.

Ib. sec. 12. **954. One appointed for each county.**—Unless by special act it is otherwise provided, a county superintendent for each county in the state shall be appointed by the superintendent of education.

Ib. sec. 22. **955. Terms of office.**—The terms of office of county superintendent of education, unless otherwise provided, shall commence on the first day of October of each odd year, and shall be for two years and until their successors shall qualify; but the superintendent of education may, at any time, for good cause shown, remove from office any county superintendent of education.

Ib. sec. 20. **956. Oath of office and bond.**—Every county superintendent of education, before entering upon the duties of his office, must take the oath of office prescribed by the constitution, and give bond in an amount to be fixed by the superintendent of education, but in no case to be less than double the probable amount of money that may be in his hands at any one time, with good and sufficient sureties, and payable and conditioned as official bonds of other public officers.

Ib. sec. 20. **957. Approval and record of bond.**—Such bond must be approved by, and, with the oath of office, must be filed and recorded in the office of the judge of probate of the county; and a certified copy of the bond must also be filed in the office of the superintendent of education for his approval.

Ib. sec. 20. **958. New or additional bond; effect of notice to give.** The superintendent of education shall require of any county

superintendent of education a new or additional bond, in the same, or a different amount, as that of the original bond, whenever he shall find it necessary for the protection of the educational fund of the county; and no county superintendent of education, after receiving notice to give such new or additional bond, shall continue in the discharge of the duties of his office until such new or additional bond is given.

959. Compensation.—Each county superintendent of education shall receive for his services seventy-five dollars per annum, and two per cent. upon the amount of all the educational funds legally disbursed by him; but neither such salary nor per-centum must be taken or used by him until after the disbursements have been made, and the credits allowed by the superintendent of education. Ib. sec. 24.

960. His duties.—The duties of each county superintendent of education shall be as follows: Ib. sec. 13.

1. He shall have an office at the county site of his county, where he must, on the first Saturday of each month from the beginning of the scholastic year until the close of the public schools for that year, be present to transact business with the officers and teachers of public schools. Subd. 5.

2. He must receive and take charge of any money, funds, property, or proceeds of any character, raised in his county by county taxation, or which may accrue to him or to the county from any gift, grant, bequest, devise, endowment, or otherwise, to be used in aid of, or in connection with money apportioned to his county from the educational fund, and shall faithfully keep the same, separate and apart from any other funds or property whatsoever; and he shall apportion, distribute and pay out all money raised in accordance with this subdivision; but all money, raised by local taxation in any school district or incorporated city or town, shall be expended for the benefit of the district, city, or town in which the money is raised, and by such persons, and in such manner as are authorized by the laws of force for the control and government of public schools in such district, city, or town. Subd. 2.

3. He shall receive and keep exclusively for the use of public schools all money belonging to the educational funds of his county; and he shall give to the tax-collector receipts in triplicate for the amounts paid to him by such tax-collector, and the same he shall immediately certify to the superintendent of education, with the date of payment, and specifying the amount received as poll-tax from each race, and all other taxes. Sec. 14.

4. He shall examine into the condition of all school funds of his county, including the sixteenth section fund, and sixteenth section lands unsold in his county; and he is authorized and required, in the name of the state for the use of the township, to bring all necessary suits for the recovery of the possession of such lands, or against trespasses thereon. Sec. 13, subd. 4.

5. He shall, as soon as he receives the annual apportionment of the educational fund to his county, forthwith notify the superintendent of each township of the amount apportioned for each race to the township. Sec. 13. subd. 6.

6. He shall enter in a book or books, kept for that purpose, the exact amount and date of all moneys received and paid out by him on account of the educational fund of his county, show- Sec. 17.

ing by whom or to whom paid, and for what purpose, and also the amount of the educational fund apportioned to, and distributed in each township for each race; and such book or books shall be open for the inspection of all persons interested.

Sec. 18.

7. He shall, on or before the first day of November of each year, forward to the superintendent of education, on blanks to be furnished him by the latter, an annual report of the public schools of his county for the preceding year, which shall set forth (1) the amount of school money received by him from all sources to the end of the year, specifying how much was received from each source; (2) how much has been disbursed by him during such year, for what purpose, and the names of teachers to whom money has been paid, the time they taught, and the total amount paid to each teacher, specifying how much was paid for teaching schools for the white race, and how much for the colored race; (3) the amount of funds then in hand for each race in each township, or other school district in his county; and (4) the manner in which, and the extent to which he has discharged the duties required by law to be performed by him.

Sec. 25.

8. He shall semi-annually, on the first days of April and October, make under oath, and post at the court-house of his county, an itemized statement of all moneys received and disbursed by him during the scholastic year, and showing the balance on hand.

Sec. 13, subd. 3.

9. He shall remove from office any township superintendent when the interest of public education demands such removal, and he shall fill all vacancies occasioned by removal from office or otherwise.

Subd. 1.

10. He must quarterly, on the first Saturdays in January, April, July and October of each year, or as soon thereafter as practicable, pay the teachers of the public schools, upon the certificate of the superintendent of the township in which the school was taught; and in counties in which separate districts have been established by special laws, he shall pay over to the officers authorized to receive the same their proportionate shares of the school revenues at the times above designated; and for the moneys so paid out by him he shall take receipts in duplicate, one to be kept in his office, and the other to be forwarded with his annual report to the superintendent of education.

Ib. sec. 13, subd. 1, as amended Feb. 23, 1883, p. 173.

961. Report delivered to judge of probate; duty of commissioners as to.—Each county superintendent of education shall also deliver a duplicate of his annual report to the judge of probate of his county, who shall lay the same before the commissioners court, or board of revenue, at its first regular meeting thereafter, and if it is found apparently correct, an order shall be made for its record on the minutes; but if it is not found apparently correct, the court or board shall so report to the superintendent of education, who shall at once make an investigation of the accounts of such county superintendent.

Ib.

962. Commissioners to audit accounts and count money. It shall also be the duty of the commissioners court, or board of revenue, at its regular meetings in April and November of each year, and it may do so at any other regular meeting, to require the county superintendent of education to bring before it his accounts and vouchers up to that time, and the money then on hand; and such court or board shall forthwith audit such ac-

counts and vouchers, and count the money, and, within ten days thereafter, make report of the same to the superintendent of education; but nothing contained in this or the preceding section shall prevent the superintendent of education from examining into the accounts and vouchers of any county superintendent of education, and counting the money on hand, either in person or by some duly authorized agent, at any time he may deem it advisable or necessary.

963. Forfeiture for failure to make annual reports.—If any county superintendent shall willfully fail to make out and forward to the superintendent of education any annual report required by this article, within ten days after the time it should be made, he shall be liable to a forfeiture of his pay and commissions, and to removal from office by the superintendent of education. Ib. sec. 19.

964. When money may be refunded to tax-collector. When any tax-collector shall have paid to the county superintendent of education more money on account of the poll-tax for any one or more years than may be due on a final settlement for such year or years, and the same has been expended for the support of the public schools of such county, the county superintendent of education, on the certificate of the superintendent of education that such payment and settlement are correct, shall refund the same to such tax-collector out of any future sum collected and paid over to him on account of the poll-tax. Ib. sec. 16.

965. Vacancies, how filled; term, etc., of appointees.—The superintendent of education shall fill all vacancies in the office of county superintendent of education, by appointment; and such appointee shall hold during the unexpired term, and until his successor is appointed and qualifies, and shall give bond and qualify as is required of an appointee for a full term. Ib. sec. 23.

ARTICLE IV.

TOWNSHIP SUPERINTENDENTS.

966. By whom appointed; term of, and eligibility to office.—A township superintendent for each township or other school district in each county, who shall be a freeholder or householder, resident in such township or other school district, shall be appointed by the county superintendent of education, subject to the approval of the superintendent of education, whose term of office shall be for two years, and until his successor shall qualify, and shall commence on the first day of October of each odd year. Ib. sec. 27.

967. Establishment and supervision of schools.—The township superintendent shall have the immediate supervision of the public schools in his township, and shall have the power to establish, subject to the approval of the county superietendent of education, one or more schools of either race in such township, as the public necessity may require; but not more than two schools shall be established for either race in any township in which the fund of such race does not exceed fifty dollars. Ib. sec. 29; March 1, 1881, p. 67, sec. 31, subd. 1.

968. Meeting with parents and guardians, and business to be transacted thereat.—Each township superintendent shall annually, on the last Monday in October, or within seven days Ib. sec. 31, as amended, March 1, 1881, p. 67.

thereafter, call a meeting of the parents and guardians of the children of his district within the educational age; and at such meeting he shall, in consultation with such parents and guardians, and with a view to subserve their wishes, interests and convenience, transact the following business:

1. He shall determine the number of schools which shall be established in his district for the current scholastic year, and shall designate the same by number.

2. He shall fix the location of each school, the time of its opening, and the length of the session, which shall not, except as hereinafter provided, be less than twelve weeks.

3. He shall apportion to each school, so established, the amount it shall receive from the public school revenue apportioned to the township and race for the current scholastic year; and in making such apportionment, he must have regard to the number of the children of the district within the educational age, who will probably attend each school, and apportion the district fund to the several schools of his district, as nearly equal per capita as practicable, so that all the children, who attend the public schools established for them, shall receive equal benefit from such fund.

4. He shall determine the number, and what children shall be transferred from his district to the schools of other districts, and to what districts transferred, during the current scholastic year, and shall set apart an amount of the money apportioned to his district to pay for such transferred children, which shall be in the proportion that the number so to be transferred bears to the whole number of children within the educational age in his district; and if it should be deemed impracticable to establish in his district a public school for the children of either race, on account of the want of a sufficient number of such race living within a reasonable distance, he shall determine whether any of such children can be conveniently transferred to a public school in another district, and those that cannot be so transferred, and that have actually attended some school in this state for the time during which the public schools were kept open for the current scholastic year, shall be entitled to the benefits of the amount apportioned to his district; and he shall determine the amount to which each of such children shall be entitled, and the same shall be paid by the county superintendent of education to the parent or guardian of such child, for which a receipt shall be taken as in case of payments to teachers.

5. Such other business as may be necessary to carry out the provisions of the law.

Ib. sec. 31, subd. 5.

969. Report after such meeting.—He shall, within ten days after such meeting, report to the county superintendent of education the number and location of the schools, the names of the teachers employed, and the amount of money apportioned to each school.

Feb. 7, 1879, p. 117, sec. 32.

970. Notice and duration of meeting; effect of failure to attend.—Such meeting shall be called by posting, ten days previously thereto, written notices of the time and place of meeting, and of the business to be transacted thereat, in not less than three public places in the district; and the township superintendent shall have the power to continue the meeting from day

to day until all the business has been transacted, and he may adjourn the same to a future day, not exceeding one week; and if the parents and guardians fail to attend such meeting, the township superintendent shall, in their absence, proceed to perform the duties required of him.

971. Appeal to county superintendent, whose decision final.—An appeal may be taken from the decision and action of the township superintendent, had and done at the time and place of such meeting, to the county superintendent of education, who shall notify the township superintendent of the appeal, and shall appoint a day on which to hear and determine the same, and whose decision shall be final. Ib. sec. 33.

972. When but one school in township, how located; change of location.—When but one school is established in a township, it shall be so located as to accommodate the largest number of pupils, and to encourage the building of a permanent school-house as near the center of the township as possible, whenever it can be done without material injury or inconvenience to the children within the educational age; but such location may be changed by the township superintendent from year to year, in order to provide for those who were not in reach of the school in previous years; and in the location of public schools, township superintendents must have reference to the population and neighborhood, paying due regard to any school-house already built, or site procured, as well as to all other circumstances proper to be considered, so as to promote the interests of free public education. Ib. sec. 28.

973. To what regard must be had in locating schools and employing teachers.—In locating public schools, and employing teachers, township superintendents shall have due regard to such communities as will supplement the district fund, and to such teachers as will procure and teach the greatest number of pupils within the educational age; the object of this section being to encourage the building up and maintaining of large schools, which shall continue the longest term practicable; but in no case shall such communities and citizens, as are unable or unwilling to supplement the district fund, be deprived of the benefit of the public schools. Ib. sec. 36.

974. Employing teachers and opening schools; rules in reference to.—The township superintendent shall, in no case, contract with teachers, or open schools until he has definitely determined the number and location of the schools in his district, and the amount of money each school shall receive from the amount apportioned to his district; nor shall he contract for a school of less than three scholastic months, or less than ten pupils within the educational age, if there are more than that number of each race within such age, or more than fifty pupils to each teacher. Ib. sec. 34, as amended, March 1, 1881, p. 67.

975. Execution of contracts with teachers; contract for transferred pupils.—All contracts with teachers shall be in writing, and shall specify the amount to be paid per month from the district fund, and shall be executed in duplicate, one of which shall be filed with the county superintendent of education for his approval within ten days after it has been signed; and no such contract shall be valid without his approval; and the town- Ib. sec. 35.

ship superintendent shall also, in like manner, contract with teachers for transferred pupils.

Ib. sec. 38.

976. Visits to schools.—The township superintendent shall visit the schools in his district at least once during each scholastic year.

Ib. sec. 41.

977. Removal of teachers; payment for time taught.—The township superintendent may, for any cause sufficient in his judgment, terminate the contract of, and remove any teacher; but such teacher shall be allowed pay for the time he taught according to the terms of his contract.

Ib. sec. 42.

978. Register of daily attendance required of teachers. The township superintendent shall require the teachers of public schools to keep a register of the daily attendance of the pupils in the schools taught by them, and to submit such register to him for his inspection.

Ib. sec. 39.

979. Enumeration of children; reports thereof.—The township superintendent must, during the month of August of each odd year, make an enumeration of all the children, white and colored, male and female, within the educational age, in his district, and report the same, in duplicate, to the county superintendent of education by the first day of September following; and the county superintendent of education shall make to the superintendent of education a written report of the several enumerations made to him by the township superintendents, by the fifteenth day of September of such year.

Ib. sec. 30.

980. Bonds when lands about to be sold or leased.—When any township superintendent is about to sell or lease any school lands, he must give bond with sufficient sureties, payable to the state, in a sum to be fixed by the county superintendent of education, equal to the value of the school lands, or the amount of the school funds of his township, and with condition to discharge his duties faithfully so long as he may continue in office, or discharge any of the duties thereof; which bond must be approved by the county superintendent of education, and by him filed in his office.

Ib. sec. 40.

981. Report of income from sale or lease of lands.—When any portion of the sixteenth section of any township has been leased or sold, and the proceeds of such lease or sale are still in the hands of the township superintendent, he must report to the county superintendent of education the annual income to the township from such lease or sale.

Ib. sec. 44.

982. Exemption from road and jury duty, and poll-tax. Township superintendents are exempt from road duty, jury duty and poll-tax, so long as they shall continue in office and perform the duties thereof; and the certificate of the county superintendent of education of that fact shall be evidence thereof.

CHAPTER 3.

PUBLIC SCHOOLS.

ARTICLE 1.—Teachers.
2.—Educational board, and teachers' institutes.
3.—Districts, pupils and scholastic periods.

ARTICLE I.

TEACHERS OF PUBLIC SCHOOLS.

983. Certificate of qualification.—There shall be three grades of teachers' certificates, to be known as certificates of the first, second and third grades, each of which must show the branches in which the holder has been examined, and his relative attainments therein; and every teacher in the public schools must obtain a certificate in one of such grades; but in no case shall an applicant for the position of teacher receive a certificate who fails to answer correctly seventy per cent. of the questions propounded by the board of examiners. Feb. 7, 1879, p. 117, sec. 45; March 1, 1881, p. 75, sec. 1.

984. Examination of teachers.—Every applicant for a teacher's certificate must be examined on the following subjects: For the third grade, in orthography, reading, penmanship, primary arithmetic, primary geography and the elementary principles of physiology and hygiene; for the second grade, on all the foregoing subjects, and also in practical arithmetic, history of the United States, English grammar, intermediate geography and elementary algebra; for the first grade, on all the foregoing subjects, and also in higher algebra, natural philosophy, geometry and the theory and practice of teaching; but no certificate of the first or second grade shall be granted to any person who has not passed a satisfactory examination in physiology and hygiene, with special reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system.* March 1, 1881, p. 75, sec. 2; Feb. 10, 1885, 113, sec. 2; Dec. 12, 1882, p. 20, sec. 2.

985. How long certificates are valid.—A third grade certificate shall be valid for one year; a second grade certificate, for two years; and a first grade certificate, for three years, in the county in which the same is issued. March 1, 1881, p. 75, sec. 3.

986. Register kept by teacher and submitted.—Every teacher of a public school must keep a register of the actual daily attendance of the pupils in his school, and must submit such register to the township superintendent for his inspection. Feb. 7, 1879, p. 117, sec. 46.

987. Quarterly report; not entitled to compensation until forwarded.—Every teacher of a public school must, within five days after the end of each scholastic quarter, forward to Ib. sec. 43, as amended March 1, 1881, p. 67.

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* On February 26, 1887, an act was approved, providing, "That from and after the passage of this act, no license shall be granted to any one to teach in the third grade of any public school of this state, unless the applicant for such license shall pass a satisfactory examination by the board of education of the county in which the application is made, and shall answer seventy per cent. of the questions propounded by the board in the following branches of study, viz.: Orthography, reading, penmanship, practical arithmetic through fractions, primary geography, elementary principles of physiology and hygiene."—Pamph. Acts, 1886–'7, p. 129.

the county superintendent of education a complete report, setting forth the enrollment, attendance, number of transferred pupils, and from what township transferred, the branches taught, and the number of pupils in each, distinguishing between male and female, and stating whether a white or colored school; also the monthly pay from school revenue from the township in which the school is located, and from transferred pupils, stating township and range from which they are transferred; also the number of days taught, the amount due for services from school revenues of the township, the number of visits by township superintendents, and the name and post-office of the teacher; and such report must be sworn to by the teacher before the township superintendent, and approved by him; and no teacher can draw any pay for services rendered by him until he has forwarded his report in accordance with the requirements of this section.

Ib. sec. 37.

988. To be paid quarterly.—The teachers of public schools shall be paid quarterly, on the first Saturdays in January, April, July and October, or as soon thereafter as practicable.*

ARTICLE II.

EDUCATIONAL BOARD AND TEACHERS' INSTITUTES.

Feb. 7, 1879, p. 117, sec. 47, as amended, March 1, 1881, p. 67.

989. Educational board; how instituted; power to fill vacancies.—There shall be established in each county of the state an educational board, composed of the county superintendent of education, who shall be the president thereof, and of two teachers, either in private or public schools of the county, who shall be appointed by such superintendent at the beginning of each scholastic year, or as soon thereafter as practicable, and who shall hold office during the current scholastic year, and one of whom shall be appointed secretary; and a majority of the board shall be necessary for the transaction of any business. The county superintendent of education shall have power to fill all vacancies that may occur in such board.

Ib. subd. 2.

990. Meetings of board.—Such board shall meet quarterly at such times and places as they may designate; but may meet oftener when deemed advisable by them.

Ib. subd. 3; Dec 5, 1882, p. 5.

991. Examination of applicants; effect of diploma.—Applicants for license to teach in the public schools of the county must be examined by such board, and the questions and answers in such examination must be in writing, and must be preserved by the board for one year, open to inspection; and when an applicant is found duly qualified, and is of good moral character, he must, on the payment of a fee of one dollar, which shall be divided between the two members of the board appointed by, and acting with the county superintendent of education, receive a license to teach in the public schools of the county, which must be signed by the president and secretary of the board; but a diploma from any chartered institution of learning will entitle the applicant to such a license without examination, on proof of good moral character, and payment of the license fee.

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*Provisions for pay of teachers changed by act of February 28, 1887.—Pamph. Acts 1886-7. p. 117.

992. Register of license kept; cancellation noted thereon. Ib. subd. 4.
A register of all licenses issued by the board shall be kept by them; and whenever any license shall be canceled, that fact shall be noted on such register, together with the cause of such cancellation.

993. Cause for cancellation of license.—Whenever it shall appear to the board that any teacher to whom a license has been issued has been guilty of intemperance, or of unworthy or disgraceful conduct, his license shall be canceled, and his name strickened from the registered list of teachers by the board. Ib. subd. 5.

994. Examination, license and register necessary.—No teacher shall be employed in any of the public schools of any county in this state, or receive any of the school funds, unless he has been so examined, has received such license, and the same has been so registered in the county. Ib. subd. 6.

995. Teachers' institutes to be organized.—It shall be the duty of the board of education in each county to organize and maintain therein teachers' institutes, one for teachers who are white persons, and one for teachers who are colored persons, to be held at such times and places as the board may prescribe; but there shall not be less than ten licensed teachers in the county of the race for whom such institutes shall be organized. Ib. subd. 7.

996. Officers and members of institutes; no fee imposed without consent.—The county superintendent of education shall be the president of such institutes, and the members of the educational board shall be the vice-presidents thereof, one of whom shall preside over its meetings in the absence of the president; the other officers thereof may be elected. Every teacher of the county holding a license shall be a member of the institutes organized for his race. But no fee or assessment shall be imposed on a member without his consent. Ib. subd. 8.

997. Meetings of institutes.—There shall not be less than three meetings in each year of such institutes, one of which shall be held in the month of September, and at this meeting an address to the teachers shall be made by some person selected by the educational board; and teachers holding licenses shall attend at least one of such meetings. Ib. subd. 9

998. Business of meetings of institutes.—The meetings of the institutes shall be devoted mainly to discussions and instructions in regard to the methods of teaching and disciplining schools, and to the text-books used, and other matters connected with the schools and school laws.* Ib. subd. 10.

ARTICLE III.

DISTRICTS, SCHOOLS, AND SCHOLASTIC PERIODS.

999. School districts; establishment and supervision; capacity to hold property.—Every township, and fraction of a township, which is divided by a state or county line, or any river, creek, or mountain, or other barrier rendering intercourse between the different portions of the township difficult, and every incorporated city or town having three thousand inhab- Feb. 7, 1878, p. 117, sec. 48

* By act approved February 28, 1887 (Pamph. Acts 1886–7, p. 58), provision is made for holding, in each congressional district, one or more teachers' institutes.

itants, or more, shall constitute a separate school district; and each of them shall be under a township superintendent as to all matters connected with public schools. Each township, or other school district, in its corporate capacity, may hold real and personal property; and the business of such corporations, in relation to public schools and school lands, shall be managed by the township or district superintendents.

Ib. sec. 49. **1000. Pupils entitled to instruction in public schools.** Every minor over the age of seven years shall be entitled to admission into, and instruction in any public school of his or her own race or color in this state.

Ib. sec. 50. **1001. Scholastic periods.**—The scholastic year shall begin on the first day of October of each year, and end on the thirtieth day of September of the following year; twenty days shall constitute a school month, and a school day shall be not less than six hours.

Ib. sec. 51. **1002. Public examinations, and certificates to pupils.** Public examinations must be held in the public schools at least once in every year; and when the educational board shall be satisfied that any pupil has become thoroughly educated in all the branches of free instruction in any one of such schools, they shall give to him or her a certificate to that effect.

Ib. sec. 52. **1003. Separate schools for the two races.**—In no case shall it be lawful to unite in one school children of the white and colored races.

CHAPTER 4.

APPORTIONMENT AND DISBURSEMENT OF SCHOOL FUNDS.

Feb. 7, 1878, p. 117, sec. 3. **1004. Certificate and apportionment of educational fund for scholastic year.**—On the first day of October of each year, or as soon thereafter as practicable, the auditor shall certify to the superintendent of education the amount of money which has accrued and been placed by him to the credit of the educational fund for the scholastic year commencing on that day, stating specifically the amount derived from each source, and any unexpended balance there may be from the appropriation of the previous year to be carried forward; and the amount so certified shall be apportioned by the superintendent of education, and be drawn and disbursed as provided by law.

Ib. sec. 53. **1005. Contingent expenses and amount for normal schools set apart; residue apportioned.**—As soon as such certificate is received by the superintendent of education, he shall set apart out of the general fund a sufficient amount to pay such expenses of the department of education as are by law payable out of such fund, and the amount necessary to cover the expenses of normal schools; and he shall then apportion all the balance of such fund, as nearly as practicable, among the several townships and school districts in the state, as hereinafter provided.

Ib. sec. 54. **1006. Amounts apportioned certified to auditor; no warrants drawn in excess; balance unapportioned certified to treasurer.**—As soon as such amounts have been set apart, and such apportionment has been made, the superintendent of edu-

cation shall certify to the auditor the amount set apart for each particular purpose or appropriation, and the total amount of the apportionment to the several school districts in each county for each race; and the auditor shall see that no warrants are drawn against the educational fund, for any purpose, for any amount in excess of the amounts so certified as set apart and apportioned; and he shall certify to the treasurer the amount of the school revenue, exclusive of poll-tax, unapportioned by the superintendent of education; and the treasurer shall set apart the amount out of any money received from the taxes of the current year, and he shall keep the same separate and apart from all other revenues, and shall not pay out any of such money except upon warrants for school purposes.

1007. Interest on sixteenth section or other trust fund first set apart; effect of apportionment.—In making the apportionment of school money to the several districts, the superintendent of education shall first set apart to each township, or other school district, the amount due from the state thereto as interest on its sixteenth section fund, or other trust fund held by the state; and all townships or school districts, having an income from such source, or from the lease or sale of sixteenth section lands, shall not receive anything out of the balance of the educational fund to be apportioned, until all other townships or school districts, having no trust fund, shall have received from the general fund such amount as will give them an equal per capita apportionment with the townships or districts having such income. Ib. sec. 55.

1008. Apportionment; basis of, and how made.—The superintendent of education shall apportion the educational fund to the respective townships or school districts, subject to the provisions of the preceding section, according to the latest official returns of the enumeration of school population of the townships or other districts, which have been made to his office; and he shall also apportion the fund for each township between the races therein; but when the township superintendent of any township or district has failed to make and return the census enumeration of his township or district, as required by law, the superintendent of education shall make the apportionment to such township or district, according to the best information he can obtain as to the school population of such township or district; but in no event shall he, in case of such failure, estimate the school population of any such district or township at more than the number shown by the last official report to his office. Ib. sec. 56.

1009. Apportionment recorded, and certified to county superintendents; when contracts for schools invalid.—As soon as such apportionment is completed, the superintendent of education shall have the same recorded in his office, in books kept for that purpose, showing the amount which has been apportioned to each school district, and the source or sources from which the same was derived, the amount to each race in the district, and the number of children of each race in the district upon which the apportionment was based; and he shall then furnish to each county superintendent of education a certified copy from such books, showing the dividends of the educational fund to each township or district under the latter's supervision; and the amount so divided and certified shall be the total amount which Ib. sec. 57.

each of such school districts shall be entitled to receive from the state, except the poll-tax, during the current scholastic year; and no contract to pay for any school or schools, for any district, more than the amount thus apportioned to it, together with such poll-tax as it may receive, and such funds as may be in hand from any previous year, shall be valid against the state or township.

Ib. sec. 58. **1010. Poll-tax received by each county.**—Each county shall receive as school money all the poll-tax collected therein; and the same shall be its full distributive share of the aggregate poll-tax collected in the state.

Ib. sec. 60. **1011. Each township and race entitled to its poll-tax; report as to such tax.**—Each township or other school district is entitled to receive, for the support of the public schools therein, all the poll-tax raised in and for such township or district; and the county superintendent of education of each county shall see that the amount of poll-tax paid by white persons shall be applied exclusively to the maintenance of schools for white pupils, and that paid by colored persons exclusively for the maintenance of schools for colored pupils; and in his annual reports, he must show how much poll-tax he has received since his last report for each race in each township or district of his county.

Ib. sec. 61. **1012. Amount due each county apportioned and certified to auditor; warrant therefor.**—The superintendent of education shall, by the tenth day of October in each year, or as soon thereafter as practicable, apportion to every county the amount of school money such county will be entitled to receive for the scholastic year, from all sources except from poll-tax and the special tax, if any, levied for school purposes in any county; and he shall certify the same to the auditor, who shall draw his warrant on the tax-collector of each county for the amount thus certified, to be paid to the county superintendent of education of each county; and the payment thereof shall be accounted as the payment of so much school money, and shall stand in lieu thereof.

Ib. sec. 62. **1013. Payment of auditor's warrant.**—The tax-collector shall pay such warrant out of any state taxes in his hands, take up the warrant, and also take from the county superintendent of education a receipt in duplicate for the amount paid, one of which he shall forward to the superintendent of education, and the other, when indorsed and approved by the judge of probate, shall be received from him by the auditor as cash in the settlement of his accounts; but no preference shall be given by the tax-collector in the payment of such warrant, but he shall make payments into the state treasury and on such warrants in the proportion which the latter bears to the whole amount of state taxes which will probably be collected in his county for the current fiscal year; but the amount of school money apportioned to the several counties, respectively, shall be first paid to the county superintendent of education for educational purposes in such county, out of the collections of state revenue in the several counties, so that the portion belonging to each county for school purposes shall always be retained in the counties.

Ib. sec. 63. **1014. Disposition of money on contest as to office of county superintendent.**—Whenever a contest as to the office of county superintendent of education is pending, the tax-col-

lector of the county shall pay over to the superintendent of education all school money which is in his hands, or which may come into his hands during the pendency of such contest; and it shall be the duty of the superintendent of education to receive the school money of such county, and deposit the same in the state treasury, as a special deposit for such county; and such money shall be paid out, on the warrant of the superintendent of education, for the support of the public schools of such county, and to such persons as would be entitled to receive the same from the county superintendent of education; but on the final determination of the contest, the superintendent of education shall pay over any balance not disbursed by him to the person in whose favor the contest is decided.

1015. Deficiency after the first day of May paid by warrant on treasurer.—When in any county the amount of funds collected and paid over by the tax-collector by the first day of May of each year, exclusive of the poll-tax, does not amount to the apportionment of the educational fund for the county, it shall be the duty of the superintendent of education to certify to the auditor the amount to which such county is entitled, after deducting the amount paid by the tax-collector to the county superintendent of education; and the auditor shall draw his warrant on the state treasurer in favor of such county superintendent of education for the sum certified to be due. Ib. sec. 67.

1016. Apportionment and expenditure of local school money.—All local school funds, raised for the support of public schools, by taxation or otherwise, shall be apportioned and expended in the district or districts in and for which the same were raised, under such rules and regulations as the township superintendent, or other local authority provided by law, may prescribe; but this section shall not be construed to repeal any provision for the apportionment and disbursement of the moneys mentioned in this chapter, or provided for in special or local laws; and all funds contributed by private parties, or otherwise, to such district shall be applied as indicated in the grant from such contributors; and no school moneys, distributed to the various counties from the state school revenue, shall, either directly or indirectly, be paid for the erection of school-houses, the use of school-room furniture, or any other contingent expenses of schools. Ib. sec. 68.

1017. Apportionment of income from trust fund when township divided.—Whenever a township, which has an income from a trust fund, is divided by a state or county line, or otherwise, into separate districts, or includes a city which is a separate school district, such income must be divided between, and apportioned to each school district in such township according to the school population of each. Ib. sec. 69.

1018. Funds unused for two years apportioned by county superintendent.—The county superintendent of education shall, in the same manner as the superintendent of education is required to apportion the general school fund, apportion among the school districts under his supervision all funds received by him for any particular school district or race, which have remained unused by such district or race for two years; and he shall make report of such apportionment to the superintendent of education as soon thereafter as practicable. Ib. sec. 71.

Ib. sec. 72.

1019. Fund once apportioned, not used for other purposes until re-apportioned.—Funds which have accrued and have been apportioned to any district or race, shall not be used for the benefit of any other district or race, until the same shall have reverted to the general fund, and been re-apportioned under the provisions of the last preceding section.

Ib. sec. 73.

1020. What part of income new districts are entitled to. Whenever any separate school district is created, which shall embrace parts of two or more townships, such district shall receive its proportionate share of the income from any trust fund belonging to either or both of such townships, according to its school population.

Ib. sec. 74.

1021. Contingent fund for department of education.—The state treasurer shall annually set apart, out of any money in the treasury not otherwise appropriated, the sum of one thousand dollars, as a contingent fund for the department of education; and whenever it shall become necessary to draw on such fund, the superintendent of education shall certify the amount necessary, and for what purpose, to the auditor, who shall draw his warrant on the treasurer for such amount. The superintendent of education shall keep an accurate account of all sums which he shall certify to be paid out of such contingent fund, and shall furnish an itemized statement thereof to the governor each year, with his annual report.

Ib. sec. 75.

1022. Unexpended part of such fund credited to next year.—At the close of each scholastic year, any part of the appropriation for the educational contingent fund, which may not be then expended, shall be carried forward by the auditor and superintendent of education, and placed to the credit of, and become a part of the one thousand dollars appropriated for the educational contingent fund of the next succeeding year.

CHAPTER 5.

SCHOOL LANDS.

ARTICLE 1.—What constitutes school lands; incorporation of townships.
2.—Lease of school lands.
3.—Sale of school lands.

ARTICLE I.

WHAT CONSTITUTES SCHOOL LANDS; INCORPORATION OF TOWNSHIPS.

1023 (962). **What are school lands, and in whom vested.** School lands, within the meaning of this Code, are sections numbered sixteen, in every township, granted by the United States for the use of schools in the township, and such other lands as may have been granted to any township for the use of schools; and all school lands are vested in the state, in trust to execute the objects of the grant.

Long v. Brown, 4 Ala. 622; Yerby v. Sexton, 48 Ala. 311.

1024 (963). **Incorporation of townships.**—The inhabitants of each township in the state are incorporated by the name of Township ———, in range ———, according to the number of the surveys of the United States.

ARTICLE II.

LEASE OF SCHOOL LANDS.

1025 (967). **Timber lots reserved.**—The township superintendent, after the surveys and plats provided for in the next succeeding article of this chapter, may select such lots as he thinks proper, to reserve from cultivation for the benefit of the timber thereon, and must mark the same "reserved" on the plat thereof. As amended, Feb. 7, 1879, p. 117, sec. 81.

1026 (968). **Other lands leased; terms of lease.**—The township superintendent may lease, for not exceeding five years, the lots so laid out and not reserved, and may stipulate for such improvements as he may deem expedient, and may require, if he thinks proper, security for rents and improvements; the rent is to be paid annually, but in case of improvements, he may stipulate for the rent to commence after the commencement of the lease. Ib. sec. 81.

1027 (969). **Rent payable to the township.**—All notes, bonds and contracts for the lease of school lands are to be made payable to the township by its corporate name.

1028 (970). **Lands rented at public auction; notice.**—All school lands must be leased, at some place in the township, at public auction; and at least six weeks' previous notice must be given by advertisement at three public places in the township, designating the time and place; and such other notice may be given as the township superintendent may deem expedient. Ib. sec. 81.

1029 (971). **Duties of lessee.**—The lessee is bound to treat the land, houses and improvements in a careful and husbandmanlike manner; to commit no waste; and he must comply with such further restrictions as the township superintendent may deem expedient to insert in the lease; and if such lessee, or any person claiming under him, commits waste, or fails to pay the rent, or to comply with any other stipulation in the lease, the township superintendent has the right to declare the lease forfeited. Ib. sec. 81.

1030 (972). **Timber lots; how used.**—The lots reserved for timber are for the common benefit of the lessees of the other lots; but no timber must be cut down, injured, or destroyed, as long as there is sufficient on the other lots, which the township superintendent is to determine; and the lessees must, in no case, cut down, injure, or destroy such timber without permission from the township superintendent, which may be given on such terms as he may think proper, having a due regard to the interests of the township. Ib. sec. 81.

1031 (973). **Penalty for injuries to timber.**—Any person who, without authority, cuts down, injures, or destroys any tree on school lands, shall forfeit and pay for every such tree ten dollars, to be recovered before any court having jurisdiction, in the corporate name of the township.

1032 (974). **Fines paid into treasury for school fund.**—All fines and forfeitures under the preceding section shall be paid into the state treasury, and added to the principal of the school fund of the township.

ARTICLE III.

SALE OF SCHOOL LANDS.

As amended, Feb. 7, 1879, p. 117, sec. 81.

1033 (975). **Election as to sale of school lands.**—The township superintendent of any township may, on giving twenty days' notice by advertisement at three of the most public places therein, hold an election to ascertain the sense of the township respecting the sale of school lands belonging thereto, and may appoint the place where such election is to be held, and three inspectors to manage the same.

Tankersly v. State Bank, 5 Ala. 277.

1034 (976). **Oath of inspectors of election.**—The inspectors, before holding such election, must take an oath to conduct the same fairly, which may be administered by one to the other; and they may appoint clerks.

1035 (977). **Absence of inspectors.**—If any inspectors are absent, those present may supply their places, and if none attend, any three freeholders or householders of the township may act.

1036 (978). **Polls.**—The polls are to be opened at eleven in the morning and closed at five in the afternoon.

Ib. sec. 8.

1037 (979). **Manner of voting.**—The voters must write upon their tickets "sale" or "no sale," and deposit them in the ballot-box; and the inspectors, after ascertaining the result, must certify the same to the township superintendent.

Ib. sec. 81.

1038 (980). **If majority for sale, survey made, and minimum price fixed.**—If, on such election, there is a majority of the voters of the township, over the age of twenty-one years, voting thereat in favor of a sale, the township superintendent is to have the lands surveyed in lots so as to command the highest price, have a plat of such survey made, and, being sworn fairly to value such lots, to fix a minimum price upon each.

Ib. sec. 81.

1039 (981). **Plat to be kept free to inspection.**—Such plat, with the minimum price marked upon each lot, is to be kept by the township superintendent free to the inspection of all persons desiring to examine the same.

Ib. sec. 81.

1040 (982). **Notice of sale.**—As soon as the lands are surveyed, the township superintendent must give thirty days' notice of the time and place of sale, by advertisement at three public places in the township, and in such other mode as he may think proper.

Ib. sec. 81.

1041 (983). **Sale at public auction; terms of sale.**—On the day appointed for the sale, between the hours of eleven in the morning and two in the afternoon, each lot must be offered separately, and sold at public auction to the highest bidder at or above the minimum price. If such minimum price is fifty dollars, or under, the sale must be for cash; if the minimum price is over fifty dollars, but not more than one hundred and fifty dollars, the sale must be on a credit of one year, unless the amount bid for the lands should exceed one hundred and fifty dollars, in which event the sale must be on a credit of one and two years, in equal annual installments; if the minimum price, or the amount bid for the lands, is one hundred and fifty dollars, or over, but less than three hundred dollars, the sale must be on a credit of one and two years, in equal annual installments; if the minimum price, or the amount bid for the lands, is over three hundred dol-

lars, but less than five hundred dollars, the sale must be on a credit of one, two, and three years, in equal annual installments; and if the minimum price, or the amount bid for the lands, is five hundred dollars, or more, the sale must be on a credit of one, two, three and four years, in equal annual installments; when the sale is on a credit, the purchaser must give his notes, with two or more sureties, approved by the township superintendent, payable to the State of Alabama, for the use of the township, designating it by its number and range, and specifying, by the legal subdivisions, the particular portion or portions of the section for which the notes are given. All notes for purchase of school lands, sold under the provisions of this article, must bear interest at the rate of eight per cent. per annum from date.

1042 (984). **Provisions directory.**—The provisions of this article, in relation to the sale of school lands, must be construed as directory only.

1043 (985). **Report of sale; disposition of purchase-money and notes.**—The township superintendent, within twenty days after such sale, must make return thereof to the superintendent of education, specifying the date of the sale, the names of the purchasers, the quantity and a particular description of the land sold to each, the price paid, or to be paid, by each purchaser, and the amount of the purchase-money retained to defray the expenses of the survey and sale; and he must, at the same time, pay over to the superintendent of education all the money which may have been received by him as purchase-money for such lands, after deducting such amount as he may be allowed by law to retain to defray the expenses of the survey and sale; and also, at the same time, turn over to the superintendent of education all notes which may have been taken by him for such lands; and the superintendent of education must give him a receipt for such money and notes, and file the return and notes in his office, and make proper record of the notes. Ib. sec. 81.

1044 (986). **Resale of lands.** — If any purchaser fails to make the payment, or give his notes with approved sureties, as required, the land bid off by him must be immediately resold, if practicable, but if it is not practicable to make the resale at once, it must be advertised and resold at a future day, as if no sale had been made; and the first purchaser shall be responsible for the difference between his bid and the amount for which the land is subsequently sold, if such amount is less than the bid of such first purchaser.

Commissioners v. Aiken, 5 Port. 169.

1045 (987). **Certificate of purchase.**—The township superintendent, on receiving from the purchaser the cash payment, and his notes for the deferred payments, must give to him a certificate of purchase, describing the land purchased, and showing the number of acres, and the amount of the purchase-money. Ib. sec. 81.

Tankersly v. State Bank, 5 Ala. 277.

1046 (988). **Effect of certificate of purchase.** — Such certificate conveys to the purchaser, his heirs, or assigns, a conditional estate in fee, to become absolute on the payment of the purchase-money and interest, and to revert to the state for the uses originally granted in the following cases:

1. When all the notes have become due, and the makers have left the state, or died insolvent.

2. When a recovery on such notes is defeated by any defense avoiding the contract of sale.

3. When a recovery is had against all the makers, and execution has been returned "no property" by the proper officers of the county in which the township lies; or when judgment is had, and execution returned against any one or more of such makers "no property," and the others have left the state, or died insolvent.

1047 (989). **Revesting of title; clerk to certify facts; penalty for failure; costs.**—No proceeding is necessary to revest the title in the state on the happening of the events specified in the preceding section, but such lands may be recovered in the name of the state, for the use of the township, against any person in possession of the same, upon proof of the facts; and it is the duty of the clerk of the court in which the suit was pending, or the judgment recovered, to certify the facts to the superintendent of education, on the happening of the events specified in the second and third subdivisions of the preceding section, and failing to do so within a reasonable time, he forfeits the sum of one hundred dollars; one-half to the person suing for the same, and the other to the state for the use of the township. When no money is recovered in suits on notes for purchase-money of school lands, no costs must be taxed against the township for such suits.

Ib. sec. 81.

1048 (990). **Compensation to township superintendents; penalty for certain defaults.**—For holding the election and making the sale, as provided in this article, the township superintendent shall be entitled to two dollars, which, together with the amount which may be allowed by law to the county surveyor for making the surveys and plats herein provided for, shall be retained by him out of the purchase-money for the lands; and purchasers shall, in all cases, pay enough cash to defray such expenses; and if the township superintendent fails to return the sale, or purchase-money notes, or to pay over the money received on account of purchase-money, to the superintendent of education, as required by law, he shall forfeit one hundred dollars, one-half to the person suing for the same, and the other to the state for the use of the township; and on the trial, the certificate of the superintendent as to such failure is presumptive evidence thereof.

1049 (991). **Fines go to school fund.**—The amount received by the state upon recoveries, had under the last two preceding sections, is to be added to the principal of the school fund of the township.

1050 (992). **Patent.**—A patent issues, on the payment of the purchase-money, to the purchaser, his heirs, or assigns; and when the patent is to the heirs, it vests a title in all persons entitled to claim in that capacity under the provisions of this Code.

1051 (993, 996). **Issue of patent by secretary of state; correction of mistake.**—The secretary of state must issue patents, upon satisfactory evidence furnished him of full payment of purchase-money, to any person, agent, or officer, legally authorized to receive such payment; and upon proof of a mistake in the issue

of any patent, he must correct the same, or issue a new patent on the return of the original to his office.

1052 (995). **Issue of patents in other cases.**—Except under the provisions of the preceding section, no patent must issue without the certificate of the superintendent of education, that the whole amount of the purchase-money specified in the certificate, with all interest thereon, has been paid.

1053 (998). **Collection of past-due notes.**—All notes for school lands deposited with the superintendent of education, if not paid within six months after maturity, must be placed with the attorney-general for collection; but this section shall not be so construed as to prevent the superintendent of education from ordering suit on notes at any time after maturity, when so ordered by the township superintendent, or the sureties on the notes. Ib. sec. 81.

1054 (999). **Appointment of agents for collection of notes.** The attorney general may appoint agents for the collection of such notes, being responsible for any neglect on the part of such agents.

1055 (1000). **Township credited with collections on notes.** All collections on notes given for the sale of school lands must be paid into the treasury of the state, to the credit of the proper township.

1056 (1001). **Investment of sixteenth section fund.**—All money arising from the sale of sixteenth sections shall be invested in bonds of this state, or other safe securities, bearing interest at a rate not less than eight per cent.

1057. Duties as to lands, when township divided; by whom performed.—When a township is divided into two or more school districts, the county superintendent of education, in appointing township or district superintendents in such township, shall designate which of them shall discharge the duties, and exercise the powers conferred upon township superintendents touching the leasing, selling and control of school lands in such township.

CHAPTER 6.

UNIVERSITY OF ALABAMA.

1058 (1295). **Incorporation of university.**—The governor and the superintendent of education, by virtue of their respective offices, and the trustees appointed from the different congressional districts of the state under the provisions of section 9, of article XIII of the constitution, and such other members as may be from time to time added to the board of trustees, and their successors in office, are constituted a body corporate under the name of the Board of Trustees of the University of Alabama, to carry into effect the purpose and intent of the congress of the United States in the grant of lands by the act of March 2, 1819, to this state, to be by it held and administered for the benefit of a seminary of learning.

1059 (1296). **General powers, duties and liabilities of such corporation.**—Such corporation shall have all the rights, pow-

ers and franchises necessary to, or promotive of the end of its creation, and shall be charged with all the corresponding duties, liabilities and responsibilities.

1060 (1297). **Power of holding and disposing of property.** Such corporation may hold, and may lease, sell, or in any other manner, not inconsistent with the objects or terms of the grant or grants under which it holds, dispose of any property, real or personal, or any estate or interest therein, remaining of the original or any subsequent grant by congress, or by this state, or by any person, or accruing to the corporation from any other source, including also the proceeds of the "University fund," as to it may seem best for the purposes of its institution.

1061 (1298). **University fund defined; credit of state pledged for payment of interest.**—The fund designated in the preceding section as the "University fund" consists of three hundred thousand dollars, the proceeds of the original grant of congress, deposited with this state; and for the payment of the interest thereon, at the rate of eight per cent. per annum, the faith and credit of the state are forever pledged; but such rate of interest shall continue only so long as it may be the policy of the state to continue the military department as a branch of the university.

1062 (1299). **When gift or grant not affected; what not a forfeiture.**—No grant or gift, by will or otherwise, shall fail on account of any misnomer or informality, when the intention of the grantor or donor can be ascertained; nor shall any default, malfeasance, misfeasance, or non-feasance, or non-user, on the part of the trustees, or other officers, or agents of such corporation, work a forfeiture of any of its rights, powers, privileges, or franchises.

1063 (1300). **Rights, etc., of university continued in corporation.**—In addition to the rights, properties, privileges and franchises herein granted, all rights, properties, privileges and franchises heretofore, by any act of the general assembly, granted to, or vested in the University of Alabama, shall vest and continue in such corporation.

1064 (1301). **Powers of board of trustees; no exclusion from benefit of university fund, etc.**—The board of trustees have the power to organize the university by appointing a corps of instructors, who shall be styled the faculty of the university, and such other officers as the interest of the university may require; to remove any such instructors or officers, and to fix their salaries or compensation, and increase or reduce the same at their discretion; to institute, regulate, alter, or modify the government of the university, as they may deem advisable; to prescribe courses of instruction, rates of tuition, price of board, and regulate the necessary expenses of students; and to confer such academic and honorary degrees as are usually conferred by literary institutions. They may delegate to the faculty of the university, or other officer or officers, such powers and functions in the government of the students, and in the administration of the affairs of the university as they may deem proper; but in no case shall any person be authorized to receive, hold, or disburse any funds of the university without having first given bond, conditioned for the faithful discharge of his duties; and no person shall be excluded from the full

benefit of the university fund, or placed at any disadvantage in the pursuit of his studies, who possesses the requisite literary and other qualifications, and is willing to submit to the discipline prescribed for students.

1065 (1302). **Classification of trustees; term and oath of office.**—The trustees are divided into three classes, as follows: The trustees from the first and fourth, and the one heretofore determined by lot from the sixth congressional districts constitute the first class; those from the second, fifth and seventh congressional districts constitute the second class; and those from the third and eighth, and the one heretofore determined by lot from the sixth congressional districts, constitute the third class; and they shall hold office, and their seats be vacated as prescribed by the constitution. Before entering upon the discharge of their duties, they shall each take an oath to faithfully perform their official duties, which oath may be administered by any officer authorized to administer oaths in this state.

1066 (1303). **Vacancy in office of trustee, how filled; term of appointee.**—Any vacancy in the office of trustee, occurring during the recess of the legislature, shall be filled by appointment of the governor, such appointee to hold until, at the next session of the legislature thereafter, such vacancy shall be filled by the governor, by and with the consent of the senate; and any vacancy occurring during the session of the legislature shall be filled by appointment of the governor by and with the consent of the senate; and any trustee appointed to fill a vacancy by the governor, by and with the consent of the senate, shall hold during the unexpired term.

1067 (1304). **Quorum of board of trustees; president pro tempore.**—Five members of the board of trustees, exclusive of the ex-officio members, shall constitute a quorum, and every member present shall be required to vote, and a majority of those present shall govern. At their first meeting, the board shall elect one of their number president *pro tempore*, who shall preside in the absence of the governor, and shall hold the position until the next annual or special meeting, when another president *pro tempore* shall be elected.

1068 (1303, 1304). **Time and place of meetings of trustees.** The board of trustees shall meet at least once in each year, and on the last Wednesday in June, unless some other day is selected by them; and the board may, at any session, appoint a special meeting, and upon the written application of any four members, or of any three members with his concurrence, the president *pro tempore* shall appoint a special meeting, and issue notices thereof to the several members; but such meeting shall not be appointed for a day less than twenty days subsequent to the date of the notice. All meetings of the board must be held at the university.

1069 (1305). **Proceedings of board recorded; employment of secretary; payment of expenses, etc.**—The proceedings of the board of trustees must be recorded in a substantially bound book, which must be kept in the archives of the university; and the board may at any meeting employ a secretary. The certificate of the president, or in his absence, of the president *pro tempore*, countersigned by the secretary, if there be one, shall entitle the several trustees to their constitutional pay out of the

treasury of the university; and the compensation of the secretary and the necessary incidental expenses of the board at each session shall be paid on the order of the board, and the certificate of the president, or president *pro tempore*, as the case may be, out of such treasury.

1070 (1306). **Report by board to the general assembly.** It shall be the duty of the board of trustees to make to the general assembly, at each session thereof, a full report of their transactions, and of the condition of the university, embracing an itemized account of all receipts and disbursements on account of the university, by those charged with the administration of its finances.

1071 (1302, 1310). **Pupils appointed free of charge.**—Three pupils from each county in the state, to be selected by the trustee from the congressional district in which such county is situate, shall be educated at the university, free of charge for tuition.

1072 (1309). **Interest on university fund; how payable.** The state treasurer must semi-annually, on the last days of December and June, pay the interest on the university fund at the rate of eight per cent. per annum, to the treasurer, or any authorized agent of the university; and on the application of such treasurer or agent, the auditor shall draw his warrant on the tax-collector of Tuskaloosa county for the amount of taxes in his hands, not exceeding the amount due from the state for interest on such funds, and the receipt therefor must be received by the state treasurer as money.

1073 (1308). **Right reserved to the legislature to revise and amend.**—The right is reserved to the general assembly to revise or amend the provisions of this chapter, and in virtue of the character of the trust conferred by the act of congress, to intervene and, by special enactment, to direct and control the board of trustees in the discharge of their duties and functions.

CHAPTER 7.

THE AGRICULTURAL AND MECHANICAL COLLEGE OF ALABAMA.*

Feb. 10, 1879. p. 194, sec. 1.

1074. Incorporation of college.—The governor and the superintendent of education, by virtue of their respective offices, and the trustees appointed from the different congressional districts of the state, under the provisions of section 9 of article XIII of the constitution, and their successors in office, are constituted a body corporate under the name of the Agricultural and Mechanical College of Alabama, to carry into effect the purpose and intent of the congress of the United States in the grant of lands by the act of July 2d, 1862.

Ib sec. 2.

1075. General powers, duties and liabilities of college. Such corporation shall have all the rights, privileges and franchises necessary to a promotion of the end of its creation, and

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* See act approved February 28, 1887, entitled "An act to aid and encourage technical education in the State of Alabama."—Pamph. Acts, 1886–7, p. 67.

shall be charged with all corresponding duties, liabilities and responsibilities.

1076. Credit of state pledged to payment of interest.—For the payment of the interest, at the rate of eight per cent. per annum, on the fund of two hundred and fifty-three thousand and five hundred dollars, arising from the sale of the scrip for the land donated in trust to this state by the act of congress of July 2d, 1862, the faith and credit of the state are forever pledged. Ib. sec. 3

1077. Powers of board of trustees.—The board of trustees have the power to organize the college by appointing a corps of instructors, who shall be styled the faculty of the college, and such other instructors and officers as the interest of the college may require; to remove any such instructors or officers, and to fix their salaries or compensation, and increase or reduce the same at their discretion; to regulate, alter, or modify the government of the college as they may deem advisable; to prescribe courses of instruction, rates of tuition and fees; to confer such academic and honorary degrees as are usually conferred by institutions of similar character; and to do whatever else they may deem best for promoting the interest of the college. They shall also establish and maintain a military department in the college, and elect a commandant and such other officers as may be necessary for the department. Ib. sec. 4.

1078. Classification of trustees.—The trustees of the college are divided into three classes, as follows: The trustees from the fourth, fifth and seventh districts shall constitute the first class; those from the eighth, sixth and second districts shall constitute the second class; and those from the third and first districts shall constitute the third class; and they shall hold office, and their seats be vacated as prescribed by the constitution. Ib. sec. 5.

1079. Vacancy in office of trustee, how filled; term of appointee.—Any vacancy in the office of trustee, occurring during the recess of the legislature, shall be filled by appointment of the governor, such appointee to hold until, at the next session of the legislature thereafter, such vacancy shall be filled by the governor, by and with the consent of the senate; and any vacancy occurring during the session of the legislature shall be filled by appointment of the governor, by and with the consent of the senate; and any trustee appointed to fill a vacancy by the governor, by and with the consent of the senate, shall hold during the unexpired term. Ib. sec. 5.

1080. Time and place of meetings of trustees.—The board of trustees shall hold their meetings at the seat of the college on the last Monday in June of each year, unless the board shall, in regular session, determine to hold its meetings at some other time or place; and upon the application in writing of any four members of the board, the governor shall appoint a special meeting, naming the time and place thereof, and cause notices thereof to be issued to the several members of the board, but such meeting shall not be appointed for a day less than twenty days subsequent to the date of the notice. Ib. secs 6, 8.

1081. Quorum of board of trustees.—Six members of the board of trustees shall constitute a quorum, but a smaller number may adjourn from day to day until a quorum is present. Ib. sec. 7.

Ib. sec. 9.

1082. Payment of expenses to trustees.—The certificate of the president of the board, or in his absence, of the president *pro tempore*, countersigned by the secretary, shall entitle the several trustees to the payment of their actual expenses incurred in the discharge of their duties as such trustees.

Ib. sec. 10.

1083. When gift or grant not affected; what will not operate a forfeiture.—No grant or gift, by will or otherwise, shall fail on account of any misnomer or informality, when the intent of the grantor or donor can be arrived at; nor shall any default, malfeasance, or misfeasance, or non-user, on the part of the trustees, or other officers or agents of such corporation, work a forfeiture of any of its rights, privileges, powers, or franchises.

Ib. sec 11.

1084. Report of trustees to general assembly.—It shall be the duty of the board of trustees to make, or cause to be made, to the general assembly, at each session thereof, a full report of their transactions, and of the condition of the college, embracing an itemized account of all receipts and disbursements on account of the college by those charged with the adminstration of its finances.

Ib. sec. 12.

1085. Interest paid by state treasurer; when bond required of officers or agents.—The state treasurer must pay the interest on the fund of two hundred and fifty-three thousand and five hundred dollars, arising from the sale of land-scrip, semi-annually, as the same may accrue, to the treasurer or other authorized officer, or agent of the college; and on the application of such treasurer, officer, or agent, the auditor shall draw his warrant on the state treasurer for such interest; but in no case shall any person be authorized to receive, hold, or disburse any funds of the college without having first given bond, conditioned for the faithful performance of his duties.

CHAPTER 8.

SCHOOL FOR THE DEAF AND DUMB AND THE BLIND.*

1086. (1311). **Educational institution established.**—There shall be established in this state an institution for the education of the deaf and dumb and the blind.

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*By act approved February 19, 1887 (Pamp. Acts, 1886–7, p. 56), a separate institution for the education of the blind is established; and on February 28, 1887 (Pamph. Acts 1886–7, p. 70), the following act was approved:

An Act to change the name of the Alabama Institution for the Deaf and Dumb and the Blind, and to provide for the appointment of a board of trustees, and to make appropriations therefor

SECTION 1. *Be it enacted by the General Assembly of Alabama,* That the name of the Alabama Institution for the Deaf and Dumb and the Blind be, and the same is hereby changed to the Alabama Institute for the Deaf.

SEC. 2. *Be it further enacted,* That the sum of two hundred and seventeen and one-half dollars annually for each pupil in said institution be, and the same is hereby appropriated for the support of said institution, said appropriation to be based on the number of pupils in actual attendance on the first day of January, in each and every year. Said appropriation to be under the direction of the board of commissioners.

SEC. 3. *Be it further enacted,* That all other appropriations for said institution be, and the same are hereby repealed.

SEC. 4. The governor shall appoint two trustees in addition to those now in office, who shall hold office for six years, and that the board shall by lot, cast at its

1087 (1312). **Incorporation of such institution.**—The governor, the superintendent of education and seven other persons, appointed as hereinafter provided, are made a body corporate, with the rights of succession forever, by the name of the Alabama Institution for the Deaf and Dumb and the Blind; and such corporation may acquire and hold property, real and personal, by gift, devise, or in any other manner, for the purposes of its creation; may sue and be sued, contract and be contracted with; may have and use a common seal, and break or alter the same at pleasure; and may have all the powers necessary and proper to accomplish the purposes of this chapter, and may locate such institution, and purchase a site therefor, together with the necessary buildings, or cause the same to be erected.

1088 (1313). **Selection of seven corporators; board of trustees.**—Such seven other persons must be nominated by the governor to the senate, who shall confirm the nomination of such as they approve, and if any one is rejected, the governor must nominate another, until the number is complete; and should a vacancy occur, the governor may fill the same by appointment, which shall be good until the next meeting of the general assembly, and until a successor is duly appointed. These seven persons and the governor and superintendent of education shall constitute a board of trustees, who shall have the entire management and control of such institution.

1089 (1314). **Quorum and meetings of board; secretary and treasurer.**—A majority of such board may act, and may meet and adjourn from time to time, as, in their judgment, the interests of the institution may require. They must appoint a secretary and keep a complete record of all their proceedings in a well-bound book; and they shall also appoint a treasurer, who shall give bond in such amount as the board may determine, and with such sureties as they may deem sufficient, for the faithful discharge of his duties as such treasurer; and he and his sureties shall be responsible for all funds which may come into his hands by virtue of his office.

1090 (1315). **Duties of treasurer.**—The treasurer must pay over such funds as may come to his hands as such, on the written order of the board of trustees, or a majority of them, which must be countersigned by the secretary and recorded in the minutes or records of the proceedings of the board, kept by such secretary; and the treasurer shall make a full report once a year, and oftener, if required by the governor.

1091 (1316). **President of board; teachers; compensation of officers.**—The board must appoint from their number a president, and they must also appoint a principal teacher for such institution, who may nominate to the board such other assistants in the institution as he may think necessary for its successful management, such board having the power of con-

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first meeting hereafter held, divide said present board into two classes; the first class to be composed of three of the present board, and the second class to be composed of four of the present trustees. The trustees of the first class shall hold their office for two years, and two of the second class for four years from the approval of this act. On the expiration of the term of office of any trustee, the governor shall appoint a successor, who shall hold office for six years. Upon the death or resignation of any trustee, the governor shall appoint a successor, who shall hold office for the unexpired term.

firmation or rejection. The board must fix the amount of compensation for each of the officers, and the time of payment.

As amended, Feb. 13, 1879, p. 34.

1092 (1317). **Annual appropriation.**—The sum of fifteen thousand dollars is annually appropriated for the support of such institution under the direction of the board of trustees.

1093 (1318). **Annual appropriation may be drawn quarterly in advance.**—The treasurer is authorized to draw quarterly in advance of the annual appropriation what may be necessary to defray the expenses of the institution for the coming quarter.

1094 (1319). **Object of institution; admission.**—The main object of such institution shall be to afford the means of education to the indigent deaf and dumb, and the indigent blind of this state. Application for admission must be made to the board of trustees in writing, and must state the name, age, place of birth and present residence of the applicant, how long he has been a resident of this state, that he is deaf and dumb, or blind, and that he and his family are unable to pay his board and tuition. The application must be sworn to by the applicant, or by some one cognizant of the facts, and filed with the board; and thereupon the board shall, if they deem the proof sufficient, cause an order to be entered on the record of their proceedings, admitting such applicant, a certified copy of which shall be delivered to the applicant, his parent, guardian, or next friend; and thereupon such applicant shall be admitted as a member of such institution for the period of time specified in the certificate.

1095 (1320). **Clothing for indigent pupils.**—In all cases where the parents of pupils sent to the institution are too poor to furnish them with good and sufficient clothing, or where the pupils are without parents, and are unable to furnish themselves with clothing, the judge of probate of the county from which they are sent shall certify the same to the principal of the institution, who shall procure the necessary clothing and charge the same to the county, and present the account, with the vouchers, to the auditor, who shall thereupon draw upon the county treasurer for the amount so charged to the county; and the county shall annually assess and collect a tax sufficient to pay such order, or orders; and if the county shall fail to do so, the circuit court in the county shall, on application therefor, compel the same by mandamus.

1096 (1321). **Application for those not indigent.**—If other persons, who are not indigent, desire to avail themselves of the advantages of such institution, they or their friends may make application to the board in writing, stating ages, names, residences, and that they are able to pay the expenses of such applicants while in the institution; and if on examination the board shall deem the applicant a suitable person to enter such institution, they shall make an order on their records admitting him into the institution, a certified copy of which shall be delivered to the applicant, or his parent, guardian, or next friend; but such applicant shall pay, or secure the payment of all his expenses for the time for which he is allowed to enter such institution.

1097 (1322). **Mechanical department.**—The board is authorized to establish and maintain a mechanical department for

the instruction of indigent pupils; the nature of the department is to be determined by the board, and is to be under the management of the principal of the institution.

1098 (1323). **Selection and powers of executive committee.** The board may select from their number an executive committee of three, subject to change and removal by the majority of the board at any time; and such committee is authorized to meet and transact any business that may be transacted by a majority of the board; and whatever acts such committee may do shall be considered as done by the whole board.

1099. Teacher of articulation employed, and necessary appliances provided.—The board of trustees shall employ a competent teacher of articulation in the institution, whose duty it shall be to teach orally such pupils as may be beneficially taught by this method, and who may be placed under his or her instruction; and the trustees shall provide all suitable apparatus and appliances necessary to successfully carry out the provisions of this section. Feb. 17, 1885, p. 158, secs. 1, 2.

1100. Oculist to visit institution to be employed.—The board shall also appoint an oculist, whose duty it shall be to visit the institution as often as the trustees may deem necessary, and to examine and operate upon the eyes of such of the pupils of the institution as, in his judgment, may be thereby benefited. Ib. sec. 3.

1101. Additional appropriation.—To carry out the provisions of the last two preceding sections, and to further provide for the support and maintenance of the institution, the sum of three thousand dollars per annum is appropriated out of any moneys in the treasury not otherwise appropriated, in addition to the annual appropriation of fifteen thousand dollars, to be drawn when the needs of such institution may require. Ib. sec. 4.

TITLE XII.

PUBLIC REGULATIONS OF TRADE AND COMMERCE.

CHAPTER 1.—Notaries public.
2.—Regulation of railroads.
3.—Warehousemen and common carriers.
4.—Storage and sale of cotton.
5.—Change bills; banking privileges; insurance companies.
6.—Weights and measures.

CHAPTER 1.

NOTARIES PUBLIC.

ARTICLE 1.—Notaries public not exercising jurisdiction of justice of the peace.
2.—Notaries public exercising jurisdiction of justice of the peace.

ARTICLE I.

NOTARIES PUBLIC NOT EXERCISING JURISDICTION OF JUSTICE OF THE PEACE.

1102 (1325). **Appointment; term of office.**—A competent number of notaries public for each county in the state are appointed by the governor, who hold office for three years from the date of their commission, and until their successors are qualified.*

Kirksey v. Bates, 7 Port. 529; Governor v. Gordon, 15 Ala. 72.

1103 (1326, 1327). **Removal vacates office.**—They vacate their office by removal from the county; and may be removed by the governor, in his own discretion.

1104 (1328). **Bond.**—They must give bond with sureties, to be approved by the judge of probate of the county for which they are appointed, in the sum of one thousand dollars, payable to the State of Alabama, and conditioned faithfully to discharge the duties of such office, so long as they may continue therein, or discharge any of the duties thereof; which bond must be executed, approved, filed and recorded in the office of the judge of probate, before they enter on the duties of such office.

1105 (1329). **Authority.**—Notaries public have authority,—

1. To administer oaths in all matters incident to the exercise of their office.

2. To take the acknowledgment or proof of instruments of writing, relating to commerce or navigation, and to certify the same, and all other of their official acts, under their seal of office.

3. To demand acceptance and payment of bills of exchange, promissory notes, and all other writings which are governed by the commercial law as to days of grace, demand and notice

* Women, citizens of this state, are now eligible to the office of notary public.—Pamph. Acts 1886–7, p. 74.

of non-payment; to protest the same for non-acceptance or non-payment, and to give notice thereof, as required by law.

4. To exercise such other powers as, according to commercial usage or the laws of this state, may belong to notaries public.

1106 (1330). **Seal.**—For the authentication of his official acts, such notary must provide a seal of office, which must present, by its impression, his name, office, state, and county for which he was appointed.

Dunn v. Adams, 1 Ala. 527; Bradley v. Northern Bank, 60 Ala. 252.

1107 (1332). **To keep a register.**—He must keep a fair register of all his official acts, and give a certified copy therefrom, when required, and on payment of his legal fees.

Phillips v. Poindexter, 18 Ala. 579.

1108 (1333). **Disposition of register on death, etc.**—In case of the death, resignation, removal, or expiration of his term of office, the registers of any notary must, within thirty days thereafter, be delivered to the judge of probate of the county; and any person having the same in possession, and refusing to deliver them on demand to such judge, is liable to an action for the recovery thereof in the name of such judge.

1109 (1334–5). **Certified copies of such registers.**—Such registers may, by such judge, be delivered to any other notary of his county, who must give certified copies from the same to any person making application therefor, on payment of the legal fees. While the registers are in possession of the judge of probate, he must give certified copies from the same on application, and the payment of the fees therefor, in the same manner as notaries public.

1110 (1336). **Certificate of demand; notice and protest; evidence.**—The certificate of a notary public, under his hand and seal of office, or of any other authorized person, under his hand and seal, of the presentment for acceptance, or demand of payment, or protest for non-acceptance or non-payment, of any instrument governed by the commercial law, or of service of notice of such presentment, demand, or protest, and the mode of giving the same, and the reputed place of residence of the party to whom the same was given, and the post-office nearest thereto, is evidence of the facts contained in such certificate.

Whitman v. Bank, 8 Port. 258; Dunn v. Adams, 1 Ala. 527; Hill v. Morris, 2 Ala. 640; Bank v. Marston, 7 Ala. 108; s. c., 10 Ala. 284; Rives v. Parmley, 18 Ala. 256; Bradley v. Northern Bank, 60 Ala. 252; Boit v. Carr, 54 Ala. 112; Martin v. Brown, 75 Ala. 542.

1111 (1337). **Justices act as notaries.**—Where there is no notary public, or he is absent or incapable of acting, any justice of the peace may discharge the duties required of such notary by the laws of this state; for which he shall receive the fees allowed by law for such services; but when he acts as a notary public, he must set forth in his certificate, protest, or notice, that there is no notary public, or that the notary public is absent or incapable of acting, which certificate shall be evidence of such fact.

1112 (1331, 1329, subd. 1). **Further authority of notaries.** Notaries have the authority of justices of the peace to take and certify the acknowledgment and proof of conveyances, to administer oaths, and take and certify affidavits; and are enti-

tled therefor to the fee or fees allowed a justice of the peace, unless their seal of office is affixed, when they are entitled, in addition, to a fee of twenty-five cents for affixing such seal, the seal to be affixed only at the request of the party for whom the service is rendered.

St. John v. Redmond, 9 Port. 550; Toulmin v. Austin, 5 Stew. & Port 376; Johnson v. McGehee, 1 Ala. 186; Harrison v. Simons, 55 Ala. 510.

1113 (5065). **Notary's fees.**—Notaries public are entitled to the following fees: For presenting any bill of exchange for acceptance, or any bill of exchange, promissory note, or other writing for payment, fifty cents; for protesting the same for non-acceptance, or non-payment, certifying, affixing seal of office, and registering the same, one dollar; for notice of protest to each party, fifty cents; for every other protest, certificate, registration and seal, two dollars; for any oath, certificate and seal, taken under subdivision one of section 1105 (1329), fifty cents; for giving copies from register, twenty cents for each hundred words; for each certificate and seal to such copy, twenty-five cents; for giving any other certificate, and affixing seal of office, fifty cents.

ARTICLE II.

NOTARIES PUBLIC EXERCISING JURISDICTION OF JUSTICE OF THE PEACE.

1114. Appointment and term of office.—The governor may appoint one notary public for each election precinct in counties, and one for each ward in cities of over five thousand inhabitants, who, in addition to the powers of notary, as defined by law, shall have and exercise the same jurisdiction, and the same powers, as justices of the peace, within the precinct or ward for which he is appointed; and he shall hold office for the term of three years from the date of his commission.

Coleman v. State, 63 Ala. 93; Carey v. State, 76 Ala. 78.

1115. Governor may remove.—The governor may, in his discretion, remove, at any time, the notary so appointed.

1116. Vacation of office.—Such notary vacates his office by removal from the precinct or ward for which he is appointed.

1117. Official bond.—Such notary, before entering on the duties of his office, must give bond with sufficient sureties, in the penalty of one thousand dollars, payable to the State of Alabama, with condition that he will faithfully discharge all the duties of his office during the time he continues therein, or discharges any of the duties thereof; which bond must be approved by the judge of probate of the county, and filed and recorded in his office.

1118. Jurisdiction; powers.—Such notary, within the precinct or ward of his appointment, has all the jurisdiction, and must exercise all the powers of a justice of the peace, and is subject to all the liabilities to which a justice of the peace is subject; and all the remedies which may be pursued against a justice of the peace, and his sureties, or either of them, may be pursued against him, and his sureties, or either of them.

1119. Dockets and files to be delivered to successor.—On the vacation of the office, or the expiration of the term of office of a notary public having the jurisdiction of a justice of the

peace, the docket and all papers pertaining to his office, as justice, must be delivered to his successor, if he have a successor appointed, within thirty days, or if he have no successor, to a justice of the peace of the precinct; such successor or justice must complete all unfinished business pending before such notary, and must exercise all the powers and jurisdiction in reference to such unfinished business, and in the issue of process upon judgments rendered, and in the certifying of such dockets and papers, which he can or may exercise in reference to business originally commenced before him, and in reference to his own judgments, dockets and papers.

CHAPTER 2.

REGULATION OF RAILROADS.

ARTICLE 1.—Railroad commissioners.
2.—Regulations affecting public safety.
3.—Regulations affecting convenience of passengers.
4.—Commercial regulations.

ARTICLE I.

RAILROAD COMMISSIONERS.

1120. Appointment and term of office.—A commission known as the railroad commissioners of Alabama, consisting of a president and two associates, who shall be competent persons, and who shall be appointed by the governor by and with the advice and consent of the senate, is established. Under the appointment first made under the provisions of this chapter, one of such commissioners, to be designated by the governor when he nominates them to the senate, shall hold office for two years, and the others for four years; but thereafter the term of office of each commissioner shall be for four years; and each commissioner appointed hereunder shall also continue in office until his successor is duly appointed and qualifies. Feb. 26, 1881, p. 84, secs. 13, 14, as amended, Dec. 4, 1886, p. 48.

1121. Oath of office.—The commissioners shall be state officers, and, before entering upon the discharge of their duties, they shall take the oath of office prescribed for other state officers. Ib.

1122. Vacancy, how filled.—Any vacancy occurring in the office of such commissioners shall be filled by the appointment of the governor by and with the advice and consent of the senate; but if the senate is not in session at the time such vacancy occurs, the vacancy may be filled by the appointment of the governor, subject to the approval of the senate when convened; such appointee to hold the office during the unexpired term, and until his successor is appointed and qualifies. Ib.

1123. Disqualification for office.—No person owning any stock in any railroad corporation, or in the employment of any railroad corporation, or of any person owning or operating a railroad in this state, shall be nominated by the governor, or confirmed by the senate as a member of such commission. Ib.

Ib.

1124. Impeachment; before what court, and grounds of. Such commissioners may be impeached and removed from office by the supreme court for the same causes, and in the same manner as other state officers; and any commissioner, who shall accept any gift, gratuity, emolument, or employment from any person or corporation owning or operating a railroad in this state, during his continuance in office, except a permit for himself to pass over the railroad of such person or corporation, shall forfeit his office, and may be impeached and removed from office therefor, as for any other cause of impeachment.*

Feb. 26, 1881, p. 84, secs. 17, 19.

1125. Salaries; clerk and his salary; expenses.—The president of such commission shall receive a salary of thirty-five hundred dollars per annum, and the associate commissioners shall each receive a salary of three thousand dollars per annum; and they may employ a clerk at a salary not exceeding fifteen hundred dollars per annum; such salaries to be paid as the salaries of state officers are paid. All money paid out under the provisions of this article, including such sum as may be necessary to procure office furniture and stationery, and to pay other office expenses, shall be paid on warrants drawn by the auditor on the treasurer; but such office expenses shall not exceed five hundred dollars per annum.

Ib. sec. 17.

1126. Office, meetings, and record of proceedings.—Such commissioners shall have an office at the capitol, and shall there meet on the first Monday in every month, September excepted, and shall remain in session until all business before them is disposed of; and they shall hold other sessions at such times and places as may be necessary for the proper discharge of their duties, or as the convenience of parties, in the judgment of the commissioners, may require; and they shall keep a record of all their proceedings, which shall be open at all times to the inspection of the public.

Ib. sec. 32.

1127. Commissioners and clerk not to contract with railroads.—No railroad commissioner, or clerk of the commission, shall, during his continuance in office, personally, or through any partner or agent, render any professional services, or make or perform any business contracts for or with any corporation or person owning or operating a railroad in this state, except contracts made in the capacity of such corporation or person as common carrier.

Ib. sec. 18.

1128. License tax against railroads; how amount ascertained; penalty for operating without license.—Every person or corporation operating a railroad in this state must annually, at the time of returning its property for taxation, make return of the gross earnings of such railroad during the preceding year; and if such railroad is partly in another state, the gross earnings shall be apportioned to each mile of main track on the entire line, and the sum thus apportioned to each mile, multiplied by the number of miles in this state, shall be considered the gross earnings of such railroad in this state; and should any such person or corporation fail to make such return of the gross earnings of such railroad, the auditor shall ascertain and assess the same from information. The auditor must then as-

*The preceding sections of this article were rewritten by the joint committee to make them conform to the provisions of the amendatory statute noted.

certain what percentage of the aggregate of gross earnings thus returned or assessed will be sufficient to pay the expenses of the railroad commission authorized by law, and assess a license tax against every such railroad for the amount of such percentage of its gross earnings; and the person or corporation operating any such railroad shall pay the tax so assessed against it to the treasurer on or before the first day of June of each year. Upon the production of the treasurer's receipt for such tax, and satisfactory evidence that the person or corporation paying the same is prepared to transport freight and passengers with reasonable safety over such railroad, the auditor shall issue to such person or corporation a license to operate such railroad for one year; and any person or corporation, operating a railroad in this state without such license, shall forfeit one hundred dollars for each day while so engaged, one-half to any person suing for the same and the other half to the state.

1129. Supervision of railroads; recommendations as to management; right of free passage.—Such railroad commissioners shall have general supervision over all the railroads in this state; shall, from time to time, as they may deem necessary, examine the same, and keep themselves informed as to their condition and the manner in which they are operated with reference to the security and accommodation of the public, and their compliance with their charters and the laws of this state; and shall, in writing, recommend to the persons or corporations operating such railroads, or any of them, from time to time, the adoption of such measures and regulations as the commissioners may deem conducive to the public safety and interest; and the commissioners, in the performance of their duties, shall have the right to pass free of charge on all the railroads in the state, and to take with them any person in their official employment. Ib. secs. 21, 22.

1130. Revision of railroad tariffs.—It is the duty of the railroad commissioners to consider and carefully revise all tariffs of charges for transportation made by any person or corporation owning or operating a railroad in this state; and if, in their judgment, any such charge is more than just compensation for the service for which it is proposed to be made, or amounts to unjust discrimination against any person, locality, or corporation, they shall notify the party making the same of the changes necessary to reduce the rate to just compensation, or so as to avoid unjust discrimination; and when such changes are made, or when none are deemed proper and expedient, they shall append to the tariff of charges a certificate of their approval; and they shall exercise a watchful and careful supervision over all tariffs and their operation, and revise the same, from time to time, as justice to the public and the railroads may require, and increase or reduce any of the rates, as experience and business operations may show to be just; but in revising any tariff, the commissioners shall take into consideration the nature of the service to be performed, the entire business of the railroad, and its earnings from passengers and other traffic, and so revise the the same as to allow a fair and just return on the value of the railroad, its appurtenances and equipments. Ib. sec. 15, as amended, Feb. 23, 1883, p. 177.

1131. Complaints against approved tariffs, and proceedings thereon.—The commissioners must hear and consider all com- Feb. 26, 1881, p. 84, sec. 16.

plaints made to them in writing by any person against any railroad tariff of rates approved by them, on the ground that the same affords more than just compensation, or amounts to unjust discrimination, and specifying the item or items against which complaint is made; and if it appear to them that the matter should be investigated, they shall forthwith fix the time and place for hearing the complaint, and furnish the person or corporation operating the railroad against which the complaint is made, with a copy of such complaint, and notice of the time and place fixed by them for hearing the same; and, at such time and place, they shall hear the parties, in person or by counsel, and such evidence, oral or written, as may be offered, allowing the examination of witnesses under oath, and giving such time and latitude to each side, and so regulating the opening and concluding of argument, as to them may seem best adapted to attaining the truth; and conforming, as nearly as may be convenient, to the mode of proceedings required of arbitrators. When the hearing is concluded, the commissioners shall give to the person or corporation operating such railroad written notice of any changes deemed proper by them to be made.

Feb. 23, 1883, p. 151.

1132. When must make recommendations of joint local rates.—When any line of railroad consists of two or more railroads under one general management, or when there are connecting lines of railroad, such commissioners shall recommend joint local rates of freight, so as to avoid, as far as possible, the injustice of combined local rates in the transportation of freight over such line or lines; but in making any such recommendation, they shall have due regard for the value of the services to be performed, and the rules and principles governing such transportation, and shall not, in any instance, make any recommendation which does not allow the persons or corporations operating such lines a fair and reasonable compensation for the services to be performed.

Feb. 26, 1881, p. 84, sec. 20.

1133. Authority to notify railroads of desired changes or repairs.—Whenever, in the judgment of the railroad commissioners, repairs are necessary upon any railroad in this state, or any addition to the rolling stock, or any addition to, or change of stations, or station-houses, of any such railroad, or any change in its rates of fares for transporting freight or passengers, or any change in the mode of operating its road, or conducting its business, is reasonable and expedient, in order to promote the security, convenience, or accommodation of the public, they shall, in writing, notify the person or corporation operating such railroad of the repairs, improvements, or changes which they adjudge to be proper; and a report of such notice, and the proceedings thereon, shall be included in the annual report of the commissioners to the governor.

Ib. sec. 24.

1134. Fencing of railroads.—When such commissioners deem it necessary that any railroad in this state, or any portion thereof, should be fenced, they shall notify the person or corporation operating such railroad of their conclusion; and upon failure, after reasonable notice, to fence such railroad, or the portion thereof designated, the person or corporation operating such railroad shall be liable in damages for the value of any stock injured or killed upon the portion of the line so designated to be fenced, whether with or without negligence; but if

the fence is erected in conformity to the notice, no liability shall attach for stock injured or killed upon the portion of the line so fenced, unless such injury or killing was committed willfully.

1135. Effect of determination of commissioners. — When any matter, relating to the regulation or supervision of any railroad in this state, or of any person or corporation operating any such railroad, and coming within the jurisdiction of the railroad commissioners, has been determined by them in the course of any proceeding before them, proof of such determination, to be made by a copy thereof certified by the president or their clerk, shall be received in any suit, or other legal proceeding in any court, or before any officer, as prima facie evidence that the determination made by them of such matter was right and proper. Feb. 23, 1883, p. 178.

1136. Railroads must furnish commissioners with information requested, and list of stockholders.—The managers of railroads, operated in this state, shall furnish such commissioners with all information required by them relative to the management of their respective lines, and with copies of all leases, contracts and agreements made by them with express, sleeping-car, or other companies, to which they are parties, or affecting such lines, and such commissioners shall have, at all times, access to the list of stockholders of every corporation operating a railroad in this state, and they may, at any time, cause the same to be copied, or any part thereof, for their own information, or for the information of persons owning stock in such corporation. Feb. 26, 1881, p. 84, secs. 23, 30.

1137. Annual reports to commissioners.—Every person or corporation operating a railroad in this state must, on or before the first day of September of each year, make to the commissioners in duplicate, in the manner prescribed, and upon blanks to be furnished by them, annual returns of the business of such railroad up to the close of its business on the thirtieth day of June next preceding; and any such person or corporation, failing to make such returns, shall forfeit to the state fifty dollars for each day of such failure. Ib. sec. 25.

1138. When accident to be reported to commissioners; proceedings thereon.—Every person or corporation operating a railroad shall give notice to the commissioners of any accident happening on any portion of its line within this state, which is attended with serious injury to the person of any one, within twenty-four hours thereafter; and upon receiving such notice, or upon public rumor of such accident, one or more of the commissioners may repair to the scene of the accident, and inquire into the facts and circumstances thereof; and the result of such inquiry, with such details as may be deemed necessary, shall be entered upon the record of the proceedings of the commissioners, and embraced in their annual report. Ib. sec. 26.

1139. When books of railroad may be examined by commissioners.—Upon the application in writing of a director, or of persons owning one-fiftieth part of the entire paid in capital stock of any corporation operating a railroad, or of the bonds or other evidences of indebtedness of such corporation, equal in amount to one-fiftieth part of its paid in capital stock, the commissioners shall make an examination into the books and Ib. sec. 29.

financial condition of such corporation, and may, in their discretion, cause the result of their examination to be published in one or more newspapers in this state.

Ib. secs. 27, 34.

1140. Witnesses before commissioners, and their compensation.—Such commissioners may summon and examine, under oath, such witnesses as they may think proper in relation to the affairs of any railroad in this state, or of any person or corporation operating such railroad; and any witness summoned before such commissioners may be sworn by any one of them. Witnesses summoned to appear before the commissioners shall be entitled to the same per diem and mileage as in the circuit court; and, when summoned on behalf of the commissioners, they shall be paid by warrant of the auditor on the treasurer, drawn on the certificate of the president, stating the amount to which they are entitled; when summoned on behalf of any party, they shall be paid by such party.

Ib. sec. 35.

1141. Duty to attend sessions of state board of assessment. Such commissioners, on notice by the governor, shall attend the meetings of the state board of assessment, and, if required, give such board all information they can that will assist them in the assessment of taxes against persons or corporations operating railroads.

Ib. sec. 28.

1142. Reports of commissioners to the governor.—On or before the first day of November, of each year, the railroad commissioners, through their president, shall make to the governor, for transmission to the general assembly, a report of their acts and doings for the year ending on the thirtieth day of June next preceding, setting forth such facts as will disclose the actual working of the railroad system in this state, and making such suggestions as to the general railroad policy of the state as may to them seem appropriate; and they shall also therein submit such recommendations for further legislation upon the subject of railroads as they may deem necessary or advisable for the interests of the state.

Ib. sec. 33.

1143. Provisions of article not to affect duties, etc., of railroad; effect of adoption of recommendations.—The provisions of this article shall not be construed so as to affect, in any manner or degree, the legal duties, rights and obligations of any person or corporation owning or operating any railroad in this state, or the legal liability of such person or corporation for the consequences of its neglect or mismanagement, whether adjudged by such commissioners to be reasonable, expedient and proper, or not; but when such person or corporation has adopted the recommendation or advice of the commissioners, in a matter in which they had authority to recommend or advise, proof of such fact shall be received in any suit or other legal proceeding in any court, or before any officer, as prima facie evidence that the thing done, or omitted to be done, upon such recommendation or advice, was right and proper.

ARTICLE II.

REGULATIONS AFFECTING PUBLIC SAFETY.

1144 (1699). **Duty of engineer as to ringing bell and blowing whistle.**—The engineer, or other person having control of the running of a locomotive on any railroad, must blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road-crossing, or any regular station or stopping place on such railroad, and continue to blow the whistle or ring the bell, at short intervals, until he has passed such crossing, or reached such station or stopping place. He must also blow the whistle or ring the bell immediately before, and at the time of leaving such station or stopping place; and also immediately before entering any curve crossed by a public road, where he cannot see at least one-fourth of a mile ahead, and must approach and pass such crossing at such speed as to prevent accident in the event of an obstruction at the crossing. He must also blow the whistle or ring the bell, at short intervals, on entering into, or while moving within, or passing through any village, town, or city. He must also, on perceiving any obstruction on the track, use all the means within his power, known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train.

N. & C. R. R. Co. v. Peacock, 25 Ala. 229; M. & C. R. R. Co. v. Bibb, 37 Ala. 699; N. & D. R. R. Co. v. Comans, 45 Ala. 437; M. & O. R. R. Co. v. Malone, 46 Ala. 391; M. & O. R. R. Co. v Williams, 53 Ala. 595; S. & N. R. R. Co. v. Jones, 56 Ala. 507; S. & M. R. R. Co. v. Shearer, 58 Ala. 672. M. & M. R. R. Co. v Blakeley, 59 Ala. 471; Tanner v. L. & N. R R. Co , 60 Ala. 621; M. & C. R. R. Co. v. Copeland, 61 Ala. 376; S. & N. R. R. Co. v. Thompson, 62 Ala. 494; M. & C. R. R. Co. v. Lyon, Ib. 71; S. & N. R. R. Co. v. Williams, 65 Ala. 74; Cook v. Central R. & B. Co., 67 Ala. 533; Gothard v. A. G S. R. R. Co., Ib. 114; Central R. & B. Co. v. Letcher, 69 Ala. 106; A. G. S. R. R. Co. v. McAlpine, 71 Ala. 545; s. c. 75 Ala. 113; A. G. S. R. R. Co. v. Hawk, 72 Ala. 112; A. G. S. R R. Co. v. Powers, 73 Ala. 244; E. T., V. & G. R. R. Co. v. Bayliss, 74 Ala. 150; s. c., 75 Ala. 466; A. G. S. R. R. Co. v. Roebuck, 76 Ala. 277; E. T., V. & G. R. R. Co. v. Bayliss, 77 Ala., [illegible] Clements v. E. T., V. & G. R. R. Co., Ib., 533.

1145 (1702). **Duty as to railroad crossing.**—When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within one hundred feet of such crossing, and not proceed until they know the way to be clear; the train on the railroad having the older right of way being entitled to cross first.

1146 (1722). **Sign-boards.**—Every railroad company must erect, at all points where its road crosses any public road, at a sufficient elevation to admit of the free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railroad and warn persons of the necessity of looking out for the cars.

1147 (1700, 1722). **Railroad liable for injuries; burden of proof.**—A railroad company is liable for all damages done to persons, or to stock or other property, resulting from a failure to comply with the requirements of the three preceding sections, or any negligence on the part of such company or its agents; and when any stock is killed or injured, or other property destroyed or damaged by the locomotive or cars of any railroad, at any one of the places specified in the three preceding sections, the burden of proof, in any suit brought therefor, is on the railroad company to show a compliance with the

requirements of such section, and that there was no negligence on the part of the company or its agents.*

See citations to section 1144 (1699).

1148 (1703). **Superintendent instructs as to law.**—The chief superintendent of every railroad shall instruct the engineers and conductors thereof as to the provisions of sections 1144 (1699) and 1145 (1702), and order them to comply therewith.

1149. Jurisdiction of justice of the peace for damages to stock.—A justice of the peace has jurisdiction of all actions for injury to, or destruction of stock by the locomotive or cars of a railroad, if the sum in controversy does not exceed one hundred dollars; and the action may be brought before a justice of the peace of the precinct in which the injury or destruction may occur, or any justice of the county in which the railroad company has its principal place of business.

1150 (1711). **Suit barred within six months.**—If the amount in controversy for injury to, or destruction of stock, does not exceed one hundred dollars, the suit must be brought within six months from the date of the injury or destruction.

1151 (1718). **Signals by steamboat when approaching draw-bridge.**—All steamboats approaching, with the intention of passing through, any railroad draw-bridge, when about three miles, and again when about two miles, and again when about one mile, and again when about half a mile therefrom, must give, as signals, three loud and distinct sounds of the whistle; and any steamboat attempting to go through such draw without giving such signals shall forfeit five hundred dollars, one-half to the informer, and the other half to the county or counties in which the bridge is situated.

As amended, Feb. 16, 1885, p. 121.

1152 (1719). **Draw to be opened on signal; penalty.**—Any railroad company owning, or agent having supervision over, or management or control of, any such draw-bridge, shall, upon signal being given as provided in the preceding section, proceed at once to open, or cause to be opened, the draw of such bridge for the passage of such steamboat; and on failing to open such draw immediately upon signal being given, without lawful excuse therefor, such company and agent shall forfeit to the use of the owner of such steamboat the sum of two hundred and fifty dollars, to be recovered in any court of competent juris-

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* By act approved February 28, 1887 (Pamph. Acts 1886–7, p. 146), section 1700 of the Code of 1876 was amended so as to read as follows: "Section 1700. **Railroad liable for injuries, and burden of proof.**—A railroad company is liable for all damages done to persons, stock and other property, resulting from a failure to comply with the requirements of the preceding section, or any negligence on the part of such company or its agents; and when any person or stock is killed or injured, or other property damaged or destroyed by the locomotive or cars of any railroad, the burden of proof, in any suit brought therefor, is on the railroad company to show that the requirements of the preceding section [section 1699 of that Code, section 1144 of this Code] were complied with, at the time and place when and where the injury was done." Section 1147 of this Code, while embodying section 1700 of the Code of 1876, contains other provisions not contained in the latter section. The one cannot, therefore, be substituted for the other, without omitting a material provision; and hence it is given in a note.

By act approved February 28, 1887 (Pamph. Acts 1886–7, p. 78), railroad companies are required to keep a record of the marks and brands of stock killed or injured by trains or locomotives, and penalties are provided for a failure to keep such record.

diction; but suit for such forfeiture must be brought within ninety days after the date of the failure to open such draw.

1153 (1720). **Bridge signals by railroad.**—Immediately upon the draw being opened sufficiently wide for the passage of such steamboat, the person in charge of the bridge shall ring loudly and continuously a large bell until the boat has passed through the draw; and in foggy weather, and also between sunset and sunrise, the person in charge shall, as soon as the draw is opened sufficiently wide for the passage of the boat, hoist above the draw a blue light, of not less than eight inches in diameter, to an elevation sufficient to prevent the frame-work of the bridge obstructing the sight of the light up and down the river, and shall keep one white light on each end of the draw; such lights to remain stationary until the boat has passed through the draw, and to be exhibited only when the draw is open for the passage of a boat; and in foggy weather, and also between sunset and sunrise, when the draw is not open, there shall be exhibited on the draw, as a signal thereof, a red light so situated as to be visible up and down the river.

ARTICLE III.

REGULATIONS AFFECTING THE CONVENIENCE OF PASSENGERS.

1154. Depot conveniences.—Every railroad company, for the comfort and accommodation of its passengers, must have, when required by the railroad commissioners, at each of the passenger stations along the line of railroad operated by such company, sufficient sitting or waiting rooms, to be determined by the commissioners, for passengers waiting for trains, having regard to sex and race, which shall be suitably heated in cold weather, and supplied with sufficient fresh drinking water, when passengers waiting for trains are present, and with sufficient and comfortable chairs or seats; and connected therewith a sufficient number of comfortable privies, or water-closets, to be at all times kept clean; and, if there is a telegraph station thereat, when any passenger train is delayed, a bulletin posted in a conspicuous place at such station, showing how much the train is behind its schedule time, and continue to post such bulletins each hour until the train arrives. But such company shall have ninety days, after being so required, for the erection of the buildings necessary for compliance with the provisions of this section.* Feb. 23, 1883, p. 154.

Railroad companies are bound to keep their stations in proper repair, and sufficiently lighted, and to provide reasonable accommodations for the passengers who are expected to travel their roads; but they are not required to police their station-houses, with the view of anticipating violence to passengers from strangers, which there are no reasonable grounds to expect.—Batton v. S. & N. R. R. Co., 77 Ala 591. To passengers, and to their protectors and friends attending them on their departure, or awaiting their arrival, a railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do, or would naturally resort, and all portions of the station-grounds, reasonably near to the platform, where passengers would be likely to go, and to provide safe waiting-rooms, and to keep the depot and platform well lighted at night; but this obligation does not extend to the public at large.—M. & E. R. Co. v.

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* The provisions of this section are somewhat modified, and remedies given for their enforcement, and penalties created for failure or neglect to comply therewith, by act approved February 28, 1887.—Pamph. Acts, 1886-7, p. 74.

Thompson, 77 Ala. 448. The provision of the statute, requiring privy accommodations at depots and stations. may be regarded as a legislative intimation that, theretofore, the duty was, at least, doubtful.—Ib.

1155 (1717). **Lights and water on trains.**—Every railroad company shall keep good lights on night trains, and on all trains sufficient fresh drinking water.

Feb. 23, 1883, p. 172.

1156. Police powers of conductors of passsenger trains. Conductors of passenger trains, while on duty on their trains, are invested with all the powers, and charged with all the duties and responsibilities of police officers; and when a passenger is disorderly, or uses profane, vulgar, or obscene language, or plays any game of cards, or other game of chance, for money or other thing of value, upon any passenger train, the conductor of such train may stop the train at the place where such offense is committed, or at the next stopping-place of such train, and eject such passenger from the train, using only such force as may be necessary to accomplish the removal; and he may command the employes of the company and the passengers on the train to assist him in making such removal; and he may cause the passenger so offending to be detained and delivered to the proper authorities for trial, if the act committed is a penal offense.

1157 (1721). **Trains to stop at advertised stations; forfeiture for failure.**—Railroad trains for the carriage of passengers must stop at all stations advertised by the railroad company as stations, at least half a minute, for receiving passengers thereon; and every railroad company and employe of such company, violating, or causing, or permitting any violation of the provisions of this section, forfeits to the state, for the use of the public schools, not less than twenty-five, nor more than one hundred dollars, which may be recovered before any justice of the peace of the county in which such violation occurs; and the conductor of the train shall be held prima facie to have caused any such violation occurring on the train in his charge; and the company, whose agent shall cause or permit such violation, shall also incur, and be liable for such forfeiture.*

ARTICLE IV.

COMMERCIAL REGULATIONS.

Feb. 26, 1881, p. 84, sec. 1.

1158. Railroads public highways.—The main track of every railroad in this state is a public highway, over which all persons have equal rights of transportation for passengers and freight, on the payment of just compensation therefor to the owner of the railroad.

Ib. secs. 1, 2, 3, 7.

1159. Extortion by railroad; liability therefor.—Any person or corporation, engaged in the business of transporting passengers or freights over any railroad in this state, who shall ex-

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* By act approved February 28, 1887 (Pamph. Acts 1886–7, p. 98), it is enacted: "That from and after the passage of this act, all trains on railroads in this state, carrying passengers, are required to be stopped, by the persons in charge thereof, at the telegraph station, now existing or hereafter established, nearest or most accessible, to be determined by the railroad commission, to the county-seat of each county through which the railroad, or any part thereof, may pass, for the purpose of receiving and discharging passengers, when signaled to stop, or whenever there is any passenger on board who desires to stop at such station.

act and receive for such transportation more than just compensation therefor, or demands more than the rates specified in any bill of lading issued for such freights, or who, for his own advantage, or for the advantage of any connecting line, or of any person or locality, shall make any unjust discrimination in such transportation, against any individual, corporation, or locality, such over-charge or discrimination to be determined by the jury, is guilty of extortion, and is liable to the party injured for double the damages sustained, and a reasonable attorney's fee for the recovery thereof, unless it appears that the service as to which the extortion was committed, was performed at rates or upon terms previously approved by the railroad commissioners, and then only to actual damages, without such attorney's fee; to be recovered in a court of competent jurisdiction of any county in which the person or corporation operating such railroad does business, by an action commenced within ninety days after such cause of action accrues. If the plaintiff fails in any such suit, and it appears on the trial that the rates or terms complained of are not higher than those previously approved by the railroad commissioners, he must pay the costs of the suit, and also a reasonable attorney's fee to the defendant for defending the suit, the amount of which fee must be determined by the court or jury trying the cause.

1160. What evidence that rates are not extortionate.—In such suit, the fact that the rates or terms, in respect to which the extortion is alleged, had been previously approved by the railroad commissioners, is prima facie evidence that the same were not extortionate; nor shall any rate or charge for the transportation of freight over any railroad be held or considered extortionate or excessive, if, in the absence of any unjust discrimination, it appears from the evidence that the net earnings of such railroad for transporting freights, on the basis of such rate or charge, together with the net earnings thereof from its passengers and other traffic, does not amount to more than a fair and just return on the value of such railroad, its appurtenances and equipments. Ib. secs. 5, 6.

1161. Rates on freight to be posted at depot; discrimination unlawful.—Every person or corporation, owning or operating a railroad in this state, must publish, by posting at all the freight depots along the line of such road, the tariffs of rates for the transportation of freight thereon, showing the rates for each class, and including general and special rates; and from such tariffs no reduction shall be made in favor of any person which is not also made in favor of all other persons or corporations by change in such published rates. Special rates, if so published, may be given to any person or corporation to aid in the development of any industrial enterprise in this state. Ib. sec. 9, as amended Feb. 23, 1883, p. 190.

1162. Freight or passengers may be transported free. Nothing in this Code shall be so construed as to prevent any person or corporation owning or operating a railroad from transporting freight or passengers free of charge. Ib. sec. 12.

1163. Agreements for pooling unlawful.—It shall be unlawful for two or more railroad companies, or persons operating railroads in this state, to enter into any agreement, directly or indirectly, for the division among themselves of the freight-carrying business at any station, town, or city in this state, or Feb. 23 1883, p. 152.

into any pool arrangement of like nature or character, the purpose or effect of which shall be to prevent free and fair competition among such companies or persons for such business, or to establish extortionate rates in favor of such companies or persons in doing such business, or to operate in undue restraint of the trade or business at such station, town, or city; and any such agreement, made by any convention or association of freight agents, or commissioner of freight rates, or rate-making committee, outside of the state, but to be therein performed, in whole or in part, shall, as to such part thereof as is to be performed within the state, be also unlawful. But no agreement, rate, or pool arrangement, made for the purpose of cheapening freight rates, or of extending additional facilities to the public generally, or to any station, town, or city in this state, which is not extortionate, or in undue restraint of the trade at any station, town, or city in this state, shall be construed as coming within the meaning of this section; and any agreement, rate, or pool arrangement, having the certified approval of the railroad commissioners, shall be deemed, prima facie, lawful and just in any proceeding before any court or officer of this state.

Feb. 19, 1881, p. 95, sec. 1.

1164. Trains to stop at railroad crossings for passengers or freight.—Every conductor, or other person in charge of a train, passing by, or within two hundred feet of any station of an intersecting railroad, located within two hundred yards of the intersection, must stop such train at or opposite such station, and take on and let off passengers and their baggage, and receive and deliver the freight of such station; such passengers and the persons forwarding or receiving such freight, to pay the usual fare and charges on such railroad. If the intersecting railroads have, or run their trains to a common terminus, neither shall charge a less rate per mile for freight or passengers between the place of intersection and such terminus, than is charged per mile over the whole length of its line.

As amended, March 1, 1881, p. 96, sec. 1.

1165 (1695). **Intersection of railroads; transportation on such roads, and on connecting lines.**—Railroads may be constructed so as to cross or connect with each other, by the main or branch tracks; and any person or corporation operating a railroad, when required, must transport or draw over such railroad, main line or branches, the passengers, freight, or cars of any intersecting railroad, or any railroad connecting therewith, directly or indirectly, on reasonable terms, and for a reasonable compensation; but such person or corporation is not required to receive or transport the cars of any other railroad, unless such cars are adapted to the gauge of its track, are sufficiently strong, and are otherwise in proper condition for safe transportation.

March 1, 1881, p. 96, sec. 1.

1166. Disagreements between connecting railroads; how settled.—If persons or corporations, owning or operating railroads connecting with each other, directly or indirectly, cannot agree upon the time when the passengers, freight, or cars of either shall be received by, or drawn over the railroad of the other, or as to the compensation to be paid, or as to the proportion in which the compensation for transportation of passengers or freight shall be divided or shared between them, or as to the depot accommodations or facilities for transferring passengers or freight from one road to the other, at the point of connection, either

party may file in the chancery court of any district in which the other does business a petition, addressed to the chancellor, and verified by affidavit, setting forth the matter or matters touching which they cannot agree; and upon the filing thereof, the chancellor may, in term time or vacation, if satisfied that the interests of the petitioner demand it, make an order referring the petition to the railroad commissioners for an adjustment of the matter or matters of disagreement set forth therein; a copy of which petition, and of the order made by the chancellor thereon, the petitioner shall serve upon the opposite party, or upon any officer or agent of such party on whom service of legal process may lawfully be made. Upon the making of such an order, the register shall forthwith transmit to the president of the railroad commission, or deliver to the petitioner for that purpose, a certified copy of such petition and order.

1167. Proceedings before commissioners on such petition. Ib. Upon receiving the certified copy of such petition and order, the railroad commissioners must appoint a time and place for hearing the matter in controversy, of which they must give to both parties at least ten days' notice. At the time and place appointed, or at any other time and place to which the matter may be continued, if both parties have had the required notice, the commissioners must proceed to hear the parties interested, and such evidence as they may adduce, and determine the matter referred to them, having reference to the convenience and interest of the parties or corporations owning or operating such railroads, and the public to be accommodated thereby; and their decision or award, with a statement of the facts as disclosed before them, they shall reduce to writing and certify to the register of the court in which the petition was filed.

1168. Proceedings in chancery court on award of commissioners.—Upon receiving the decision or award of the commissioners, the register must file the same, and either party has thirty days thereafter within which to file exceptions thereto. Upon the hearing of the exceptions, in term time or vacation, the chancellor may, for good cause shown, annul the decision or award of the commissioners, and remand the petition to them for further investigation, when the same proceedings shall be had as in the first instance. If no exceptions are filed within the time allowed for filing the same, or if, upon the hearing of the exceptions filed, the chancellor confirms the award or decision of the commissioners, the same must be entered as the decree of the court, and enforced as such, if necessary, by any appropriate writ; and the same shall remain of force and be binding upon the parties for the period of twelve months after the confirmation thereof. Ib. sec. 2.

1169. Revival, amendment and change of award.—Either of the parties to such proceedings may, at any time after the expiration of twelve months from the time the award takes effect, file in such court a petition to revive, modify, or amend the same; and thereupon the same proceedings shall be had as upon the original petition; or the parties may at any time, by agreement in writing, change or modify such award, and thereafter such award, as changed or modified, shall be of the same force and effect as if originally so made. Ib. secs. 3, 7.

1170. Penalty for violation of award.—Any party to such Ib. sec. 5.

award, who shall knowingly disregard or violate the same, or any of its provisions, shall forfeit two hundred dollars for each day such disregard or violation continues, one-half to any person suing for the same, and the other to the state, to be recovered in any court of competent jurisdiction of any county in which such party does business.

1171. Costs; against whom taxed.—The fees to the register for services rendered by him in such proceedings shall be fixed by the chancellor; and the costs may be taxed against either or both parties, in the discretion of the chancellor.

Ib. sec. 7.

1172. When provisions of preceding sections do not apply. The provisions of the six preceding sections do not apply to railroads intersecting each other, and having a common terminus, as to freight and passengers between the place of intersection and such terminus.

1173. Meaning of railroad company.—Unless clearly otherwise apparent from the context, the term, railroad company, as used in this chapter, includes any person or corporation owning or operating a railroad.

CHAPTER 3.

WAREHOUSEMEN AND COMMON CARRIERS.

1174 (2139). **Warehousemen or common carriers give receipt or bill of lading; contents.**—Warehousemen or common carriers, receiving things or property of any kind for safe keeping, or for carriage, for hire or reward, must, on the delivery to them of such things or property, give the person from whom received a receipt or bill of lading, stating the order or condition in which such things or property may be, and if cotton in bales is received, stating expressly the condition of the bagging, ropes, or ties; and such warehouseman or common carrier is bound to delivery in like order and condition as when received; and if such receipt or bill of lading be not given, such things or property must be deemed and taken to have been in good order or condition at the time of delivery to such warehouseman or carrier, and he is bound to delivery in like good order and condition; and the warehouseman or carrier, neglecting or failing to give such receipt or bill of lading, is liable for all loss or damages the owner of such things or property may sustain in consequence of such neglect or failure; but nothing in this section contained must be construed as affecting the common-law liability of a warehouseman or of a common carrier for an injury to, or for the loss of such things or property.

M. & E. R. Co. v. Kolb, 73 Ala. 396.

Feb. 21, 1881, p. 133, secs. 1, 2, 3.

1175. Receipt or bill of lading; when not to be given.—A warehouseman, common carrier, or a wharfinger, or other person engaged in the business of storage, carriage, or of keeping for shipment, or of forwarding things or property, must not give a receipt or bill of lading for the things or property for storage, for carriage, or for keeping for shipment, or for forwarding, unless such things or property have been actually de-

livered to him, or placed under his control; and a second receipt or bill of lading must not be issued or given, the original being outstanding, without writing across the face thereof the word "duplicate."

1176. Delivery to cotton compress.—A delivery of cotton at or to a compress for the purpose of being compressed, at the instance, or in the usual course of business of a warehouseman, common carrier, wharfinger, or other person engaged in the business of storage, or of carriage, or of keeping for shipment, or of forwarding, may be taken and deemed as an actual delivery to such warehouseman, carrier, wharfinger, or other person, and therefor a receipt or bill of lading may be issued or given. Dec. 12, 1884, p. 86.

1177. Sale, etc., by warehouseman, carrier, or wharfinger. A warehouseman, common carrier, wharfinger, or other person engaged in the business of storage, carriage, or of keeping for shipment, or of forwarding things or property, must not, otherwise than is authorized by law, or by the contract of delivery to them, make sale of things or property entrusted to them; nor, without the assent in writing of the person to whom they may have given a receipt or bill of lading, or of the legal holder of such receipt or bill of lading, incumber or transfer the same; nor must they, otherwise than as may be authorized by the contract of delivery to them, part with the control or possession of such things or property, without the assent in writing of the person to whom they may have given a receipt or bill of lading, or of the legal holder of such receipt or bill of lading. Feb. 21, 1881. p. 33, sec. 4.

1178. Warehouse receipt negotiable.—The receipt of a warehouseman, on which the words "not negotiable" are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred, must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person; but this section must not be so construed as to affect or impair the lien of a landlord on such things or property for rent or advances, or to affect or impair any lien thereon created by contract, of which notice is given by registration in the mode prescribed by law; and unless the words "not negotiable" be plainly written or stamped on the receipt, the warehouseman must not deliver the things or property therein specified except on the delivery and cancellation of the receipt; or in case of partial delivery, without an indorsement thereon of such partial delivery; in the event of the loss or destruction of such receipt, the warehouseman, not having notice of the transfer thereof by indorsement, may make delivery of the things or property to the rightful owner thereof; if the things or property, or any part thereof, be claimed or taken from the custody or possession of the warehouseman under legal process, the surrender thereof may be made without the delivery or cancellation of such receipt, or without indorsement thereon. Ib. sec. 6.

1179. False or second receipts, or delivery without cancellation, or indorsement of partial delivery.—If any common carrier, not having received things or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received, or any warehouseman, or wharfinger, or person engaged in the business of storage, or Ib. sec. 7.

keeping for shipment, or forwarding, shall issue a receipt for things or property, not having received them; or if any of such parties shall give or issue a second bill of lading, or receipt, the original being outstanding, not expressing in such second bill of lading, or receipt, that it is a duplicate, or shall surrender such things or property without receiving and canceling the bill of lading or receipt issued therefor, or make partial delivery without indorsing such partial delivery on such bill of lading or receipt, except as provided in section 1178, such carrier, warehouseman, wharfinger, or person is liable to any person injured thereby for all damages, immediate or consequential, therefrom resulting.

Feb. 13, 1879, p. 175.

1180. How common carrier absolved from liability as insurer on arrival of freight.—A common carrier, if the place of destination of freight is a city or town having two thousand inhabitants, or more, and a daily mail, is not relieved from liability as a common carrier by reason of a deposit or storage of freight in a depot or warehouse, unless, within twenty-four hours after the arrival of such freight, notice thereof is given the consignee, personally or through the mail; and if notice is given through the mail, the postage must, by the consignee, be refunded to the carrier.

1181 (2140, 2141). **Sale of perishable freight to pay charges.** When any fruit, vegetables, fresh meat, oysters, eggs, or fish, or other property of so perishable a nature as to be in danger of great depreciation, has been transported by a common carrier to the place of destination, and remains unclaimed for one day after its arrival, or if the consignee resides, or is present at the place of destination, for one day after personal notice in writing to him, or his agent, of the arrival of the freight, and the amount of charges due thereon, the same may be sold by the carrier or his agent at public outcry to the highest bidder for cash, at some public place at the point of destination, on one day's notice, indicating the nature of the package, the consignee and the time and place of sale, by publication in some newspaper published at the place of destination, or, if none is published thereat, then by posting the notice at the office or place of business of the carrier.

1182 (2141). **Sale of other freight to pay charges.**—When any other freight than that mentioned in the preceding section remains unclaimed for sixty days after its arrival at the place of destination, the same may be sold by the carrier or his agent at public outcry to the highest bidder for cash, at some public place at the point of destination, after notice, indicating the nature of the package, the consignee, and the time and place of sale, has been given for three weeks by publication, once a week, in some newspaper published at the place of destination, or, if no such paper is there published, by posting the notice at three public places therein; but before any sale can be made under this section, the carrier must, before giving notice of the sale, demand payment of the charges due thereon from the owner or consignee, if either of them resides at the place of destination; but if neither of them resides at such place, failure to make such demand shall not prevent the sale; but notice of such sale must be given the consignor by mail.

Western R. R. Co. v. Rembert, 50 Ala. 25; Nathan v. Shivers, 71 Ala. 117.

1183 (2142). **Insurance; sale; proceeds.**—The common carrier may insure the freight, at the expense of the owner, from the date of its arrival to the sale above authorized; and the proceeds of any sale made under the last two sections shall be applied to the payment of the freight, insurance, and all charges incident to storage and sale, and the residue, if any, shall be paid over to the owner or consignee.

1184 (2143). **Three preceding sections applicable to warehousemen.**—The provisions of the three preceding sections apply to warehousemen to whom freight is delivered by a common carrier.

1185. Concealing cotton or changing marks.—Any person, who conceals cotton delivered to himself or another for sale or storage, or changes or mutilates the marks or brands thereof for the purpose of hindering the owner or person having a lien thereon from recovering it, and any warehouseman who permits such conduct, shall be liable to the owner or lienor for all damages, immediate or remote, by him sustained; and any warehouseman with whom such cotton has been stored, who has information which would lead to the discovery thereof, and refuses, on application, to impart the same to the owner or lienor, is liable to him for the value of the cotton. Feb. 19, 1883, p. 59, sec. 2.

CHAPTER 4.

STORAGE AND SALE OF COTTON.

1186 (1411). **What unlawful in buying cotton.**—It shall be unlawful for any person, firm, company, or corporation, in buying baled cotton, to deduct from the actual weight thereof, or to use in weighing cotton untested weights, so as to deprive the seller of cotton of any of its real value. As amended, Feb. 28, 1887, p. 72, sec. 1.

1187 (1412). **Penalty for making deduction, etc.**—Any person, company, firm, or corporation, who violates the preceding section, shall be guilty of a misdemeanor, and, on conviction, be fined, in each case, not less than ten, nor more than fifty dollars; *Provided*, That deductions may be made by mutual consent on wet or damaged cotton bales, on each bale so weighed or deducted from.* Ib. sec. 2.

1188 (1420). **Cotton rejected on resampling must be returned.**—Whenever cotton bought from a factor is removed by the purchaser, his agent, or broker, from the warehouse in which it is stored, to another warehouse, for the purpose of reweighing resampling, or examining, and the same, or any part thereof, shall, after such reweighing, resampling, or examining, be rejected, the purchaser, his agent, or broker, must replace the cotton so rejected in the warehouse from which it was removed, in as good order as when it was removed therefrom, and pay all the costs attending such removal and replacing.

1189 (1421). **Sampling before and after selling and weighing.**—No more than six ounces of cotton shall be taken from

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* By the act of February 28, 1887, above noted, sections 1411 and 1412 of the Code of 1876 are expressly repealed. These sections were in this Code, as adopted; but, being repealed, the commissioner has substituted for them the provisions of said act.

any bale of cotton, under pretext of sampling the same; but after the sale of the cotton, and after the weight thereof has been ascertained and agreed upon, the buyer may take from the bale, at his own loss, six ounces more of cotton, for comparison with the sample by which he bought.

1190 (1422). **Cotton not removed without consent of seller.** Without the consent of the seller, cotton must not be removed from the place where it may be when sold, until the weight thereof has been ascertained.

1191 (1423). **Compensation for sampling.**—Persons engaged in buying or selling cotton must not pay, or contract to pay, for the sampling thereof, any other than a compensation in money.

1192 (1416). **Warranty on sale by planter or owner implied.** When cotton in bales is sent by a planter or other owner to a factor for sale, a warranty is implied on the part of such planter or owner to the factor, and the purchaser from such factor, respectively, that such cotton is not fraudulently packed; and when cotton is sold by sample by the owner or his factor, that the sample has been fairly drawn, and that the cotton is not fraudulently packed, and no other warranty is thereby implied; and for any breach of such implied warranty, the purchaser may recover damages, either from the owner or factor selling the same; but no action can be brought for any breach of such last mentioned implied warranty, unless the suit is commenced within one year after such sale; but planters shall not be liable, in any way, for losses sustained by factors or commission merchants for having sold cotton by fraudulent or unfair samples, unless such loss was occasioned by plating or fraudulent packing of the cotton by such planter.

CHAPTER 5.

CHANGE BILLS, BANKING PRIVILEGES, INSURANCE COMPANIES.

ARTICLE 1.—Change bills; banks.

2.—Fire, inland and marine insurance companies not incorporated by this state.

3.—Life insurance companies not incorporated by this state.

ARTICLE 1.

CHANGE BILLS; BANKS.

1193 (1424). **Suits on paper issued to circulate as money.** Every bill of exchange, note, bond, or instrument of any description, whatever may be its form or device, issued with the intent to circulate as money, without authority of law, is an absolute, unconditional promise of the association or person putting such bill, note, or other instrument in circulation, and may be sued on by the holder thereof, without transfer or assignment, and without demand, protest, or notice, and the amount thereof recovered, with interest thereon at the rate of fifty per cent. per annum from the date thereof, or from the time the same was put in circulation.

1194 (1425). **Corporations must not pay out change bills.** No turnpike, bridge, or railroad company, incorporated under any law of this state, must pay out, by their agents or officers, any change bills, notes, or paper issued without authority of law, the circulation or passing of which is prohibited by the laws of this state; and if such corporation allows the same, it incurs a forfeiture of its charter.

1195 (1426). **Persons circulating change bills held makers; remedy; liability of officers of corporation.**—Any person, private corporation or association, or any individual member thereof, who circulates, passes off, or pays out any paper or instrument commonly called a "shinplaster," issued without authority of law, and to answer the purposes of money, or for general circulation, shall be deemed and held the maker of such paper or shinplaster; and any person to whom such paper or shinplaster is passed or paid may bring suit on the same against the person passing it, as maker thereof, and recover judgment, upon his own oath, upon one day's notice, before any justice of the peace, in any county in this state, without regard to the county in which such paper was passed or paid out; but in the case of a private corporation or association having the management and control of its business committed to a president, secretary, treasurer, board of directors, or other official agency, only such members thereof as held, or assumed to hold, such official agency at the time of the commission of the offense charged, shall be held prima facie liable for the acts of such corporation or association, under the provisions of this section.

1196 (1429). **How foreign bank must exercise privilege of banking.**—No foreign corporation invested with the privilege of banking must exercise the same by agent in this state, except by the exclusive use of gold and silver coin, and national bank-notes, or other currency of the United States.

Wray v. Tuskegee Ins. Co., 34 Ala. 58; Morris v. Hall, 41 Ala. 510.

1197 (1430). **Notes and bills void.**—If any corporation, or agent, violates the provisions of this article, or attempts to evade the same in the discount of any bill or note, such bill or note is void.

1198 (1431). **Counterfeits may be defaced.**—Any person may deface, by crossing with ink or otherwise, any bank-note that may be presented to him in payment of debts, or to be changed or exchanged, if the same is counterfeit; but should it be found, on a more careful examination, that a bank-note so defaced is a genuine note, the person defacing such note shall, if required by the holder, redeem the same, and if he fails or refuses, on application being made for that purpose, he may be sued for the amount thereof before any court having jurisdiction.

ARTICLE II.*

FIRE, INLAND AND MARINE INSURANCE COMPANIES NOT INCORPORATED BY THIS STATE.

1199 (1432). **Deposit required of foreign insurance company.**—Before any insurance company, not organized under, or incorporated by the laws of this state, shall transact any business of insurance, other than life, or accident insurance, in this state, through agents, or otherwise, it shall pay into the treasury of the state, the sum of one hundred dollars, and that amount thereafter in the month of January, annually, for which the treasurer shall give his receipt and certify such payment to the auditor; but this shall not be in lieu of, or affect the amount required to be paid by such company for school purposes.

1200 (1433). **Annual statement to be filed with auditor.** On the day on which it shall apply for permission to transact business in this state, such company shall also file with the auditor a certified copy of the charter or deed of settlement of the company, and a statement exhibiting the following facts and items in relation to its business condition on the 31st day of December next preceding, namely:

First.—The amount of the capital stock of the company, and how much of the same has been paid up in cash.

Second.—The property and assets held by the company, specifying,—

1. The value and location of the real estate held by such company.

2. The amount of cash on hand and deposited in bank to the credit of the company.

3. The amount in the hands of agents, and in course of transmission.

4. The amount of loans secured by bonds and mortgages, or deeds of trust, constituting the first lien on real estate, on which there shall be less than one year's interest due or owing, the location and value of each piece of such real estate, and the amount loaned on each piece.

5. The amount of loans on which interest shall not have been paid within one year previous to such statement, and how secured.

6. The amount due the company on which judgments have been obtained, and the cash value thereof.

7. The amount of bonds of this state or of the United States, or of any other bonds or stocks, owned by the company or corporation, specifying the amount, number of shares, and par and market value of each kind of stock or bonds.

8. The amount of bonds, mortgages and stocks held as collateral security for loans, with the amount lent on each kind of stock or bonds, and their par and market value.

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* By act approved February 28, 1887 (Pamph. Acts, 1886–7, p. 85), it is enacted: (1.) "That all insurance companies, doing business as such in the State of Alabama, whether chartered by the state, or admitted from other states, shall have an actual capital, fully paid up in cash, of not less than one hundred thousand dollars, no portion of which shall be represented by stock-notes or loans on the stock of said company or companies as collateral." (2.) "That all insurance companies, doing business in the state, both foreign and domestic, shall be required to make annual sworn statements to the auditor of their assets, condition, business of the previous year, in premiums, losses, and expenses, in the state, and as a whole." (3.) "That all laws and parts of laws in conflict with this provision, be and the same are hereby repealed."

9. The amount of interest actually due and unpaid.

10. The amount of interest accrued, but not due.

11. The amount of all other assets of every description, and of what composed.

Third.—The liabilities of such company, specifying,—

1. The amount of losses due and unpaid, and how much thereof is due to citizens of this state.

2. The amount of claims for losses resisted by the company, and how much thereof is claimed by citizens of this state.

3. The amount of claims for losses incurred during the year, including those claimed and not due, and those reported to the company upon which no action has been taken, and how much thereof is by citizens of this state.

4. The amount of dividends declared and due, and remaining unpaid.

5. The amount of dividends declared and not due.

6. The amount of money borrowed, and security given for the payment therof.

7. The amount required for re-insurance of outstanding policies on basis of fifty per cent. of premiums on unexpired risks.

8. The amount of all other claims against the company, and of what they consist.

Fourth.—The income of the company during the preceding year, specifying,—

1. The amount of premiums received, designating the amount received in this state.

2. The amount of interest received.

3. The amount of income received from all other sources, and from what the same was derived.

Fifth.—The expenditures during the preceding year, specifying,—

1. The amount of losses paid during the year, stating how much thereof to citizens of this state.

2. The amount of returned premiums paid during the year.

3. The amount of dividends paid during the year.

4. The amount paid in taxes and commissions to agents.

5. The amount of all other expenditures and payments. Which statement shall be subscribed under oath by the president and secretary, or other chief officers or managers of such company, and shall be renewed annually, on the 10th day of January, or within ten days thereafter. The state auditor is hereby authorized to propose such additional inquiries as may, in his judgment, be necessary to elicit a full exhibit of the business and standing of any insurance company transacting or proposing to transact the business of insurance in this state.

1201 (1434). **Amount of capital required; consent to service of process on agent.**—It shall not be lawful for any insurance company, not incorporated by the laws of this state, to transact any business of insurance in this state, through agents or otherwise, unless possessed of at least one hundred and fifty thousand dollars of actual cash capital, invested as required by the laws of the state where organized, nor until such company, in addition to the other requirements of this article, shall have filed with the state auditor a written instrument, duly signed and sealed, whereby it shall be declared that service of process, mesne or final, issued in any suit against such company from

any court in this state, upon any agent of such company in this state, made in the manner directed by the laws of this state for the service of process upon the officers of domestic corporations, shall bind such company as service of similar process would, if made strictly in the manner directed by the laws of the state or country under which such company was organized.

1202 (1435). **Certificate of deposit required of foreign companies.**—Before any company, incorporated by the laws of any government foreign to the United States, shall transact any business of insurance in this state, it shall file with the auditor the certificate of the comptroller, or other authorized functionary of some other state, or of the United States, under his hand and official seal, that he holds on deposit, and in trust for the benefit of all the policy-holders of such company in the United States, securities in which it is authorized to invest its capital stock by the laws of the state in which such deposit is made, worth at least two hundred thousand dollars, and that this deposit is to be increased in case of any depreciation in its value; but any company, incorporated by the laws of any foreign government, which shall file with the auditor a similar certificate by the treasurer of this state, that it has so deposited with him, in his official capacity, for the benefit of its policy-holders in the United States, such securities, shall be held to have complied with the requirements of this section.

1203 (1436). **Authority of auditor to revoke license and publish notice.**—Whenever it shall appear to the satisfaction of the auditor that the assets of any company are reduced more than twenty-five per cent. below the capital stock, after reserving fifty per cent. of the amount received for premiums on all risks which are unexpired, which are hereby declared unearned premiums, he shall revoke all authority to such company, or its agents, to do business in this state, and shall cause a notification thereof to be published in any one or more newspapers of general circulation, and copies thereof to be mailed to each agent in this state for such company, which shall, after such notice, discontinue the issue of new policies, or the renewal of any previously issued.

1204 (1437). **License issued by auditor.**—Whenever any insurance company has fully complied with all the requirements of this article, and the auditor is satisfied that the affairs of such company are in sound condition, he must issue to such company a license to transact the business of insurance in this state, itself, or by such agents as it may appoint, until the 15th day of January next ensuing, which license shall be renewed in January of each year, on compliance with the terms of this article, and subject to the conditions therein.

Feb. 12, 1879, p. 26.

1205. Who are agents of foreign insurance company. Any person, who solicits insurance on behalf of an insurance company, not incorporated by the laws of this state, or who, other than for himself, takes or transmits an application for insurance, a premium of insurance, or a policy of insurance to or from such company, or in any way gives notice that he will receive or transmit the same, or receives or delivers a policy of insurance of such company, or who inspects any risk, or makes or forwards a diagram of any building, or does any other thing in

the making of a contract of insurance, for or with such company, other than for himself, or examines into, adjusts, or aids in examining into or adjusting any loss for such company, whether such acts are done at the instance of such company, of any broker, or other person, shall be held to be the agent of the company for which the act is done, and such company held to be doing business in this state.

1206 (1438, 1442). **Liability of agent, if company has not obtained license; penalty.**—Any person, acting as agent of any foreign insurance company which has not received the license from the auditor above provided for, or shall so act after its expiration, is liable personally to the holder of any policy of insurance in respect to which he so acted as agent, for any loss covered by it; and shall forfeit, for each offense, the sum of five hundred dollars, to be sued for in the circuit court where the delinquency occurs, by the solicitor, in the name of the state, and paid into the state treasury, less twenty per cent. retained by the solicitor for his services. Ib. sec.

1207 (1439). **Meaning of "company."**—The term "insurance company," as used in this article, includes every company, corporation, association, or partnership, organized for the purpose of transacting the business of insurance.

1208 (1443). **Applies when policies signed out of the state.** The provisions of this article apply when the risk is taken, or any insurance business is transacted in this state by the agent of any of the insurance companies mentioned in this article, whether the policies are signed by the officers of such companies in or out of the state.

ARTICLE III.

LIFE INSURANCE COMPANIES, NOT INCORPORATED BY THIS STATE.

1209 (1444, 1446). **Foreign life insurance companies procure license from auditor, and perform certain conditions.** No agent of any life insurance company, incorporated by any other state or foreign government, shall, directly or indirectly, take any risk or transact any business of insurance in this state without first procuring a license from the auditor of this state, and before obtaining such license, such agent must furnish the auditor a statement under oath of the president or secretary of the company for which he may act, which statement shall show,—

1. The name and locality of the company.
2. The amount of the capital stock.
3. The amount of its capital stock paid in.
4. The act of incorporation of the company.

Such statement shall be filed in the office of the auditor, with a written instrument under the seal of the company, authorizing such agent to acknowledge service of process for and in behalf of such company, and consenting that service of process upon such agent shall be taken and held as binding upon the company; and such life insurance company, or its agent, shall furnish the auditor satisfactory evidence that it is possessed of at least one hundred thousand dollars of actual capital, invested in securities of at least par value, or in bonds, or mortgages of

real estate worth double the amount for which the same is mortgaged. Upon the above statement and written instrument being deposited with the auditor, and evidence furnished as before provided, it shall be the duty of the auditor to issue a license to transact business of insurance to the agent applying for the same.

1210. (1445). **When such companies treated as home companies.**—Any life insurance company, incorporated by the laws of any other state or foreign government, which is required by its charter, and by its contract with the officer or officers of a branch department thereof organized in this state, and composed of its citizens, to invest and keep invested in this state the net present values of the liabilities of the company under policies issued to citizens of this state, as fixed by the standard of valuation of such company, shall be regarded as a home company, and shall be entitled to, and may exercise and enjoy all the rights, privileges, immunities and exemptions of life insurance companies incorporated by the laws of this state, upon filing with the auditor duly certified copies of its charter, and of its contract; but such company shall file the annual statement of its condition, now required by law of foreign insurance companies, and shall show therein the gross amount of its premiums, receipts, and the amount of its investments in this state. And it shall be the duty of the auditor to give to the president, manager, general agent, or any other agent of such company, upon his application, a license, stating that the foregoing requirements have been complied with, and authorizing it to do business as a domestic life insurance company; and such license shall be renewed annually, and shall be revoked upon failure to comply with the provisions of this section.

1211 (1447). **Copy filed with judge of probate.**—The agent of such life insurance company, before taking any risks, or transacting any business of insurance in this state, must file in the office of the judge of probate of the county in which he may desire to establish an agency for any insurance company, a copy of the statement and written instrument required to be filed with the auditor, together with his license, which shall be carefully preserved in such office for public inspection.

1212 (1448). **Statement and evidence filed annually.**—The statement and evidence required by this article must be rendered annually in the month of July; and the auditor, on being satisfied that the capital of the company remains as secure as at first, shall furnish a renewal of license, and the agent obtaining such renewal of license must file the same, together with a copy of the statement on which it was obtained or renewed, in the office of the judge of probate of the county in which such agency is established, to be carefully preserved in such office for public inspection.

1213 (1449). **Copies of papers filed, evidence.**—Copies of all papers, required by this article to be deposited in the office of the auditor, certified under the hand of such auditor to be true and correct copies of such papers, must be received as evidence in all the courts of this state, in the same manner, and have the same force and effect, as the originals would, if produced.

1214 (1450). **Return made to assessor.**—The agent of any life insurance company, not incorporated by the laws of this

state, must, on or before the first day of August in each year, deposit with the assessor of the county in which the agency of such company is established, a statement, verified by the oath of the agent of such company, specifying the gross amount (after deducting all return premiums) of premiums received for insurance by such company, at such agency, during the preceding year, or such fractional part of the year as such company may have been doing business in the city or county.

1215 (1451). **Fee of auditor and judge.**—For every statement required to be filed by this article with the auditor and judge of probate, they shall each be entitled to a fee of five dollars, to be paid by the agent filing such statements.

1216 (1452). **Applies when policies signed out of the state.** The provisions of this article apply when the risk is taken, or any insurance business is transacted in this state, by the agent of any of the insurance companies mentioned in this article, whether the policies are signed by the officers of such companies in or out of the state.*

CHAPTER 6.

WEIGHTS AND MEASURES.

1217 (1460). **Must conform to standard established by congress.**—There is but one standard of measure of length and surface, one of weight, and one of capacity, throughout this state, which must be in conformity with the standard of measure of length, surface, weight and capacity established by congress.

1218 (1461). **Contracts construed in reference to.**—All contracts, made within this state for any work to be done, or for any thing to be sold and delivered, must be construed to have been made according to the standard of weight and measure thus ascertained, unless the parties stipulate to the contrary.

1219 (1462). **Standards furnished counties by secretary of state.**—Any county which has not been furnished with weights and measures, consisting of one weight of fifty pounds, one of twenty-five pounds, one of fourteen pounds, one of seven pounds, two of four pounds, two of two pounds, and two of one pound, avoirdupois; one measure of one yard, and one of one foot, cloth measure; one measure of half a bushel, one of one peck, and one of one-half peck, dry measure; one measure of one gallon, one of a half gallon, one of one quart, one of one pint, one of one-half pint, and one of one gill, wine measure, in conformity with such standard, must be supplied therewith, by the secretary of state, as early as practicable.

1220 (1463). **When furnished in case of destruction.**—If the weights and measures of any county are destroyed, without the fault of any official who by law had charge of the same, the secretary of state shall, upon the requisition of the probate judge, furnish weights and measures to such county.

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* All foreign insurance companies are now required to pay into the state treasury one hundred dollars per annum, for the privilege of carrying on the business of insurance in this state.—Pamph. Acts 1886–7, p. 105. See note on page 196.

1221 (1464). **New counties.**—New counties must be furnished with weights and measures.

1222 (1465). **Expense of obtaining, etc.; how defrayed.** For the expense of obtaining such weights and measures, and furnishing the same to counties, the auditor must, on the account being certified by the secretary of state, draw his warrant on the state treasury.

1223 (1466). **Notice of receipt of weights and measures.** The judge of probate of each county, when furnished with such weights and measures, must, within three weeks thereafter, give notice thereof by advertisement at the court-house door, and at five other public places in the county.

1224 (1467). **Seal of weights and measures.**—Such judges must try all weights and measures presented to them, by such standards, and if found to agree with the same, must seal them with a seal to be provided at the expense of the county.

1225 (1468). **Penalty for selling by false weights and measures.**—Three months after the notice prescribed in this chapter has been given, every person selling any commodity by weight or measure, which does not correspond with such standard, forfeits the sum of ten dollars to any person suing for the same.

1226 (1469). **Standard balances, by whom kept.**—The set of balances intended for the adjustment of weights and measures, furnished to this state by act of congress, must be kept by the secretary of state.

Feb. 16, 1883, p. 51.

1227. Weight of cotton-seed.—If not otherwise agreed upon, the weight of a bushel of cotton-seed shall be thirty-two pounds, avoirdupois.

Dec. 11, 1882, p. 13.

1228. Measure of oysters.—When oysters in the shell are bought or sold by measure, it shall be only by stave measure, and the measures must be uniform in shape, and of the following dimensions: The bottom to be sixteen inches across from inside to inside; the top to be eighteen inches across from inside to inside, and the height to be nine and one-half inches from the center of the bottom on the inside to the center of the top; and three of such measures, filled and rounded, without heaping, shall constitute a barrel.

TITLE XIII.

POLICE AND SANITARY REGULATIONS.

CHAPTER 1.—Alabama insane hospital.
2.—Preservation of public health; hospitals; quarantine; vital statistics.
3.—Physicians; dentists; druggists.
4.—Retailers.
5.—Inns; hotels.
6.—Estrays and animals running at large.
7.—Marks and brands.
8.—Enclosures; trespassing animals, and partition fences.
9.—Mills and millers.
10.—Killing animals by fire-hunting, and stock by dogs.
11.—To prevent injury from gunpowder.
12.—Fire-insurance patrol.
13.—Planting oysters.
14.—Roads, bridges, ferries and water-courses.
15.—Poor and apprentices.

CHAPTER 1.

ALABAMA INSANE HOSPITAL.

1229 (1470). **Establishment of hospital.**—There is established in the State of Alabama a state hospital, for the care and proper treatment of insane persons, which is located in the county of Tuskaloosa, and near the city of Tuskaloosa.

1230 (1471). **Is a body corporate.**—Such institution is a body corporate and politic, under the name and style of the Alabama Insane Hospital, and by that name may sue and be sued; may contract and be bound; have, possess and enjoy real and personal property, and have perpetual succession; may have and use a common seal, and break or alter the same at pleasure; and, for the purposes herein set forth, have all powers properly incident to corporations of such nature; and suits for and against such corporation may be brought in the appropriate courts of the county of Tuskaloosa.

1231 (1472). **Property of corporation.**—The property of such corporation consists of such funds as have been, or may be provided by the state for the establishment and support of such hospital, and of such other money, property and assets as may be acquired by such corporation, by gift, devise, bequest, or otherwise, and the profits thereof, and of the land which has been procured, and buildings which have been or may be erected, and of the other property which has been acquired, to be used for the care, maintenance, treatment and cure of insane persons.

1232 (1473). **Board of trustees.**—The affairs of the corporation must be managed and governed by a board of trustees, consisting of a president and six others; and not less than four of

the seven shall constitute a quorum, a majority of which shall decide in all cases, and may bind the corporation.

1233 (1474). **President and trustees, how chosen; residence; term; compensation; removal.**—The president and trustees must be nominated by the governor, as often as necessary, to the senate, for its confirmation or rejection, and the appointment is completed by the confirmation of such nomination. The governor must temporarily fill all vacancies in the recess of the senate, and his appointments shall continue till the action of the senate be had thereon. They must be selected with a view to their capacity for the management of the hospital. Three of the trustees, or the president and two trustees, must be residents of Tuskaloosa county, or of a county adjoining it, and the remainder must be residents of other parts of the state. The present arrangement of the commencement and end of the respective terms of the six trustees, whereby the term of trustees shall expire at the termination of each successive period of two years, is continued. The term of the president and each of the trustees, is six years, except where a trustee is appointed to fill a vacancy, in which event the appointment is made for the unexpired term of the vacated office. All appointments made by the governor, before confirmation by the senate, are temporary filling of vacancies until they are confirmed. The governor has power to remove the president or a trustee for cause deemed sufficient by him. The senate may likewise make such removal at any time by a vote of a majority of the whole body. The president and trustees receive no other compensation than the amount of traveling expenses actually paid out while attending on the business of the corporation.

1234. (1475). **Power and duty of trustees; superintendent, his qualifications, term, removal, powers, salary; treasurer.** The president and trustees have power to make all regulations and by-laws for the government of the corporation, and shall put the hospital in use for the support, treatment and cure of the insane; they must appoint a secretary and treasurer, and such other officers and agents as may be necessary; they must appoint a superintendent of the hospital, who shall have in charge the conducting of the same. The superintendent must be a skillful physician, and bear an unblemished moral character; he must have received an enlightened and thorough professional education; be possessed of prompt business habits, and be of a humane, kindly disposition; he must be a married man, and must, with his family, reside constantly in the institution. Such superintendent must be appointed for a term not less than eight years, and must not be removed, except for incompetency, fully shown and declared, or for the neglect and infidelity to the trust reposed in him. Such superintendent must appoint all such assistant physicians, nurses, servants and agents as by the rules of the institution shall be allowed and wanted; and he shall have full control over them, and may discharge them at pleasure; he shall direct their several duties, and see to the performance thereof; and he must be responsible to the board for the proper performance of those duties. The trustees must determine what salaries and compensation shall be paid to the superintendent and other officers, servants and agents employed, and may remove any of them. The board must hold an annual meeting,

and also monthly meetings, and such other meetings as they may provide. The monthly meetings may be held by the three trustees residing near the hospital, for all ordinary purposes, to act under the authority of the board, and each, in rotation, shall serve one month to visit the hospital once a week, and the monthly board must see that the establishment is at all times supplied with provisions, fuel, water, clothing, medicines, implements, and all other things necessary for the health, comfort, cleanliness and security of the patients. The board, at its annual meetings, must examine into the manner in which the hospital is and has been conducted, and must investigate the condition of every department of it. The treasurer must receive and pay out the moneys of the corporation, and must report annually to the secretary of state all sums received and paid out by him.

1235 (1476). **Insane received from counties in proportion to insane population.**—The insane patients must be received from the several counties in this state in the ratio of their insane population, and the several counties must be so entitled; but they must report to the secretary of state the census of their insane persons respectively, such reports to be made annually by the judge of the probate court.

1236 (1477). **Expenses of patients; publication of by-laws and regulations; bonds of agents and officers.**—Persons in indigent circumstances, while residing in the hospital, and whether in their own right or by reason of the state bearing their expenses, must be chargeable with no more than the actual cost for clothing, nursing, board and medical attendance. Patients whose expenses are payable by themselves or friends, and who are not chargeable upon the counties, must pay in measure with the care received and according to the regulations which may be adopted. The board must publish the by-laws and regulations of the institution, and cause them, from time to time, to be circulated in the state for general information. They may provide for taking bond and security from all their agents and officers, conditioned for the faithful discharge of the duties of their office.

1237 (1478). **Order of admission.**—In order of admission the indigent insane must have precedence of the rich, and recent cases of both classes must have precedence over those of long standing; but paying patients from other states may be received into the hospital, should vacancies occur unclaimed by natives or residents of Alabama.

1238 (1479). **Conditions upon which paying patients are received.**—Before any applicant is received in the hospital as a paying patient, there must be produced to the superintendent,—

1. A sufficient bond, as hereinafter described.
2. Three months' charges must be paid in advance.
3. A certificate from one or more respectable physicians, declaring that in their opinion the applicant is insane.
4. Application must be made to the superintendent, and the following interrogatories answered before the patient is presented for admission:

I. Name, sex and age of the person for whom application is made?

II. How long since derangement of mind was first suspected?

III. How long has it been plainly and openly manifested?

IV. Was it gradual or sudden in its approach?

V. What is the bodily condition of the patient—vigorous and healthy, or helpless and diseased?

VI. Has the patient epileptic convulsions or paralysis in any form?

VII. Is the patient filthy or cleanly in dress and personal habits?

VIII. Is the patient noisy, violent, dangerous, or destructive?

IX. What is the character of the insanity, how exhibited, the supposed cause thereof, and any other important facts bearing upon the case?

The bond and certificate before mentioned must be substantially as follows:

"Know all men by these present, that we, —— ——, and —— ——, of the county of ——, in the State of Alabama, are held and firmly bound unto the Alabama Insane Hospital, in the penal sum of —— hundred dollars, for the payment of which we hereby bind ourselves, jointly and severally.

"Sealed with our seals and dated this —— day of ——, A. D. ——.

"The condition of the above obligation is as follows: Whereas, —— ——, of the county aforesaid, is about to be admitted as a paying patient into said hospital; now, if while he shall remain therein the undersigned shall constantly supply him with suitable clothing, and pay all charges of said hospital against him quarterly in advance, and whenever his removal shall be required, immediately remove him; and if he shall escape from the hospital, pay all reasonable charges incurred in restoring him; and if he die therein, pay all reasonable expenses incurred for his funeral; and in case of failure to perform promptly and faithfully any of the above conditions, pay all losses that accrue to said hospital by litigation, collector's fees, or otherwise, then this obligation shall be void; otherwise to remain in full force.

"Witness our hands and seals, this —— day of ———, A. D. ——.

A. B. [seal.]
C. D. [seal.]

"I have examined into the state of health and mental condition of —— ———, and my opinion is that he is insane.

"—— ———, Physician."

1239 (1480). **Balance in favor of removed patient returned.**—If there should be a balance in the treasury of the hospital to the credit of a patient removed therefrom, the treasurer must pay it to the person authorized to receive the same.

1240 (1481). **Term male applies to females.**—Every term in this chapter, importing the masculine gender, applied to patients, extends and applies to females as well as males.

1241 (1482). **Investigation of insanity and admission to hospital of indigent persons.**—When a person in indigent circumstances becomes insane, application can be made by his friends, or any other person in his behalf, to the judge of the

probate court in the county where he resides; and such judge must, without delay, make application to the superintendent of the hospital for his admission, and accompany the application with full and satisfactory answers to the following interrogatories:

First.—Name, sex, age and color of the person for whom application is made?

Second.—How long since derangement of mind was first suspected?

Third.—How long has it been plainly and openly manifested?

Fourth.—Was it gradual or sudden in its approach?

Fifth.—What is the bodily condition of the patient—vigorous and healthy, or helpless and diseased?

Sixth.—Has the patient epileptic convulsions or paralysis in any form?

Seventh.—Is the patient filthy or cleanly in dress and personal habits?

Eighth.—Is the patient noisy, violent, dangerous, or destructive?

Ninth.—What is the character of the insanity—how exhibited, the supposed cause thereof, and any other important facts bearing upon the case?

When informed that the patient can be received, the judge must call one respectable physician and other trustworthy witnesses, and fully investigate the facts in the case, and, either with or without the verdict of a jury, at his discretion, must decide the case as to sanity and indigence; and if the judge believe that satisfactory evidence has been adduced, showing the patient to be insane, and his estate insufficient to support him and his family, (or himself alone, if he has no family,) under the visitation of insanity, he must, upon the judge's certificate, be sent, within thirty days, to the hospital, at the expense of the county, and be supported there at the expense of the state; and the superintendent shall be required to keep the vacancy open for a period of thirty days after the date of his notice that the patient can be received. The judge, in all such cases, shall have requisite power to compel the attendance of witnesses or jurors, and must file the certificate of the physician, taken under oath, and other papers relating to the case, with a report of the proceedings and the decision.

1242 (1483). **Certificate forwarded and filed; form of.**—In cases provided for in the foregoing section, copies of the judge's and physician's certificates shall be sent with the indigent insane person, and filed by the superintendent of the hospital. Such certificates shall read substantially as follows:

"I, A. B., judge of the court of probate of the county of ——, and State of Alabama, do hereby report that application has been made to me in behalf of C. D., a resident of said county, alleged to be insane and in indigent circumstances, and pursuant to the act of the legislature in such cases made and provided, I have called before me Dr. ——, a respectable physician, and other trustworthy witnesses, to-wit: (State their names); and having examined them and fully investigated the case, and not deeming it necessary to call a jury, I do hereby decide and certify that satisfactory proof has been adduced before me, showing the said

C. D. to be an insane person, and that he has not sufficient estate or means to support him under said visitation of insanity.

"Given under my hand, at ———, in the county and state aforesaid, this —— of ——, in the year ——.

"A. B., Judge."

"I, E. F., of the county of ———, and State of Alabama, being duly sworn according to law, do certify and declare that I have examined into the state of health and mental condition of C. D., of the said county of ———, and that my opinion is that he is insane. E. F., Physician."

"Sworn to and subscribed before me this —— day of———, A. D. ——."

"I, A. B., judge of the probate court of———, do hereby certify that the foregoing is a true copy of my report and certificate in the case of —— ———, and also of the certificate of Doctor —— ———, thereto appended, as filed in my office.

"In witness whereof, I have hereunto set my hand, at ———, this —— day of ———, A. D. ——.

"A. B., Judge."

1243 (1484). **Continuance of patient in hospital.**—When an insane person in indigent circumstances has been sent to the hospital by his friends, who have paid his bills therein for three months, if the superintendent shall certify that he is a fit patient, and likely to be benefited by remaining in the institution, he may be retained therein at the expense of the state, on the certificate of the probate judge of his county, declaring his indigence.

1244 (1485). **Duty of county officers sending patient.**—The county officers sending a patient to the hospital, must, before sending him, see that he is in a state of perfect bodily cleanliness, and is comfortably clothed, and provided with suitable changes of raiment.

1245 (1486). **Expenses of indigents paid by county.**—All necessary expenses, incurred by county officers in sending indigent insane persons to the insane hospital, shall be paid out of the county treasury on the order of the court of county commissioners.

1246 (1490). **County commissioner acts when judge of probate incapacitated or dead.**—If the judge of probate be dead, or incapable of acting by reason of sickness, or otherwise, the duties hereinbefore required to be performed by him are required to be performed, in the same prompt manner, by one of the commissioners of the county, and his acts in the premises shall have the same validity as the acts of the judge.

1247 (1491). **Patients returned to county after two years.** All indigent patients sent, by order of the judge as specified in section 1241 (1482), are entitled to two years residence in the hospital, unless sooner restored to soundness of mind; after that period, if, in the opinion of the superintendent, such patients are not likely to be benefited by longer residence and treatment in the hospital, and are neither dangerous to the community, nor likely to suffer by removal, the superintendent is empowered to order the removal of such patients by the commissioners to the poor-house of the county of which they are residents.

1248 (1492). **Expense of removal borne by county.**—Whenever the superintendent shall order a patient removed from the hospital to the county from whence he came, the commissioners of such county must pay the actual and reasonable expenses of such removal, as part of the expenses of said county.

1249 (1493). **Discharged patients clothed and supplied with money.**—No patient must be received or discharged without suitable clothing, and if it cannot otherwise be obtained, the steward must furnish it and charge the same to the county from which he was sent. The patient must also be furnished by the steward, if it is not otherwise to be had, with money sufficient, not to exceed twenty dollars, to pay his expenses until he reaches home; and the cost of such clothing and money advanced must have precedence over other claims, and be repaid promptly by the commissioners of the county from which the patient comes, out of the first money which comes into the county treasury.

1250 (1494). **Physician of convicts reports certain classes of insane convicts.**—The physician of the state and county convicts must report to the governor the names of all insane convicts imprisoned in the penitentiary, or sentenced to hard labor for the county, whose general deportment during confinement has been good, and who were not convicted of rape.

1251 (1495). **Governor causes removal to hospital on report of physician.**—The governor must, when any case of insanity is reported to him, under the preceding section, appoint three physicians of skill and experience, of whom the physician of the convicts must be one, to examine the persons reported to be insane, and report to him the result of such examination; and if such board of physicians shall report such person insane, and a fit subject for the hospital for insane persons, the governor must cause such person to be removed to the hospital for insane persons at Tuskaloosa, at the cost of the state.

1252 (1496). **Compensation for removal.**—The same compensation must be allowed for guarding any insane convicts in the penitentiary, to and from the insane hospital, as is allowed to sheriffs and guards carrying prisoners to the penitentiary, to be paid by the state.

1253 (1497). **Restored convict returned or discharged.**—A convict to the penitentiary, sent to the insane hospital, must, upon his restoration to sanity before the expiration of his term of imprisonment, be returned to the penitentiary or discharged, as the governor may order.

1254 (1498). **Convict insane at the expiration of his term.** When any person is imprisoned in the penitentiary of this state, under a sentence of a circuit court, and is insane at the expiration of his term of imprisonment, the lessee must report the same to the governor, who must cause an examination to be made of the extent and character of such insanity; and if upon such investigation it be found that such person is a proper subject for confinement in the hospital for insane persons, he must order him to be removed from the penitentiary to the hospital; and if such person be in indigent circumstances, and had no known place of residence previous to his confinement in the penitentiary, the expenses of keeping such person must be paid by the state.

1255 (1499). **Appropriation for support of insane hospital.** For the support of the Alabama Insane Hospital, including the salaries of the resident officers, wages of the nurses and other employes, and ordinary repairs, with the board, clothing, lodging, and all other expenses of the indigent or criminal insane, the sum of four dollars per week for each indigent and each criminal patient shall be paid by the state, on the last days of March, June, September and December of each year; the auditor of public accounts to issue his warrant therefor on the order of the treasurer of the hospital, countersigned by the superintendent; but any balance remaining in the hands of the treasurer or steward at the end of the fiscal year, shall be placed to the credit of the fund for improvements and repairs, and applied expressly to those purposes.

1256 (1500). **Officers and other persons exempt from certain duties.**—The superintendent and physician and his associates and employes are exempt from militia service, from liability to work on any public road or highway, and from serving as jurors.

Lewin v. State, 77 Ala. 45.

1257 (1501). **Record to be kept and report made.**—The monthly board and the president and trustees must cause to be kept proper records of all the acts and proceedings, and proper books of accounts of all the transactions of the institution; and must, once in each year, cause to be settled and balanced all the accounts and books of their agents and officers, and must fully examine and investigate the acts of all subordinate agents and officers, and must cause to be made out, and by the first day of December, annually, file in the office of the secretary of state a full and detailed report of the situation and operations of the institution, and of all moneys paid and received, with such remarks as they may think proper to make, for the information of the governor, who must cause the same to be submitted to the general assembly at each session.

1258 (1502). **Visitors.**—The governor, judges of the supreme court, and members of the general assembly are ex-officio visitors of the insane hospital.

1259 (1503). **Roads not permitted through grounds.**—No public highway is allowed on the grounds of the insane hospital.*

CHAPTER 2.

PRESERVATION OF PUBLIC HEALTH; HOSPITALS; QUARANTINE; VITAL STATISTICS.

1260 (1504). **Municipal and county authorities may establish hospitals.**—The corporate authorities of any town or city and the court of county commissioners may establish within the town or city, or within the county, hospitals, temporary or

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* See act entitled "An act to regulate the admission and discharge of patients in the Alabama Insane Hospital," approved February 19, 1887 (Pamph. Acts 1886–7, p. 54); also act entitled "An act providing for additional accommodation for the colored insane of Alabama," approved February 22, 1887 (Ib., p. 59).

permanent, for the reception of the sick or infirm, or of persons suspected to have infectious or contagious diseases, and may make all needful rules and regulations for the control and management thereof. The corporate authorities and the court of county commissioners may unite in the establishment of such hospitals, if deemed expedient, making them common for the use of the town or city and of the county, and in the making of rules and regulations for the control and management thereof.

1261 (1505). **Nuisances to health; strangers with contagious diseases.**—When a health officer makes complaint, on oath, that there is good cause of suspicion or belief that there is on any lot, or in any house or vessel within the town, city, or county any cause of disease or infection, necessary to be destroyed or removed, or one or more persons, not in his own place of residence, infected with a dangerous contagious disease, and that he has been refused admittance into such house, lot, or vessel, the mayor or intendant, or a justice of the peace of the county in which such lot, house, or vessel is, may issue his warrant, directed to the sheriff, marshal, constable, or other lawful officer, requiring him to enter such house, lot, or vessel, and, under the direction of such health officer, to remove such infected person, or to remove or destroy the source of such infection or disease.

1262 (1506). **Warrant, how executed; pay for nursing, etc.** To execute such warrant, any outer or inner door may be forced in the day-time; and all expenses incurred in the execution thereof, and for maintaining, nursing and curing any person removed therefrom, must be paid by such person, or by the owner of the house, lot, or vessel; or if such person or owner is a married woman, by her husband; if a minor, by his parents or guardian; and if not so paid, then by the town, or city, or county by which they were incurred; the person by whom such expenses should have been paid being liable to such town, city, or county for the amount thereof.

1263 (1507). **Quarantine ground; assent of county commissioners requisite, if without town limits.**—Any town or city may establish a quarantine ground therefor; but if the place fixed upon for the purpose is without the limits of such town or city, the assent of the court of county commissioners of the county in which such place is, must first be obtained.

1264 (1508). **Regulations.**—The corporate authorities of a town or city may, from time to time, prescribe the quarantine to be observed by all vessels arriving within the harbor or vicinity thereof, and regulations therefor, not contrary to law.

1265 (1509). **Regulations extend to persons and goods arriving in, and going on board vessel.**—Such regulations may extend to all persons, goods and effects arriving in such vessel, and to all persons going on board of the same.

1266 (1510). **Vessels quarantined.**—The health officer of a town, city, or county may, under the direction of the corporate authorities, or of the court of county commissioners, cause any vessel arriving therein, or in the vicinity, if the vessel or cargo is, in his opinion, so foul or infected as to endanger the public health, to be removed to the quarantine ground, or other proper place, to be purified.

1267 (1511). **Escapes from quarantine.**—If any person or-

dered to remain in quarantine escapes, any justice of the peace, on complaint thereof, on oath, must issue his warrant to the sheriff, or to a constable, or other lawful officer, to arrest and deliver such person to the custody of the officers of the quarantine; and any such person attempting to escape may be forcibly detained at the place of quarantine by such officers.

1268 (1512). **Quarantine of travelers.**—Any person coming into a town, city, or county by land, from a place infected with a contagious disease, may be compelled to perform quarantine by a health officer, and restrained from traveling until discharged.

1269 (1513). **Expenses of quarantine.**—All expenses incurred by any town, or city, or county, on account of any person, vessel, or goods, under quarantine regulations, must be reimbursed by such person; or, in case of a vessel, or goods, by the owner thereof; and the vessel or goods may be detained until such expenses are paid.

Feb. 28, 1881, p. 77, sec. 2.

1270. Bringing into, or removal of within county, persons laboring under disease.—Persons laboring under a pestilential or infectious disease must not be taken into a county, or, being within the county, must not be removed from place to place therein, except under such regulations as may be prescribed by the county board of health.

Ib

1271. Bringing into, or removal of within county, body of deceased person.—The body of a person who has died from a pestilential or infectious disease, must not be brought into a county, or, being within the county, must not be removed from place to place therein, except under such regulations as may be prescribed by the county board of health.

1272 (1515). **Authority of court of county commissioners.** The court of county commissioners is invested with the authority conferred upon towns as to quarantine, and the establishment of hospitals for persons infected with contagious diseases; and may make such rules and regulations as are necessary to prevent the introduction or spread of contagious or infectious diseases, and, to effect that purpose, may appoint such guards and superintendents as may be deemed necessary.

Feb. 10, 1883, p. 43.

1273. Authority of judge of probate.—The judge of probate, if he deem it necessary, and is supported in his opinion by the certificate of three respectable citizens of the county, one of whom is a licensed physician, has authority to appoint guards and superintendents, and to establish hospitals to prevent the introduction or spread of contagious diseases; and, if he exercises the authority, must, as soon as practicable thereafter, convene the court of county commissioners, and such court may ratify, change, or disaffirm his acts.

Feb. 17, 1885, p. 134, sec. 1.

1274. Duty of health officer, or judge of probate of Escambia county.—It is the duty of the health officer, or of the judge of probate of the county of Escambia, whenever he has good reason to suspect or believe that yellow fever exists in the county of Escambia, or of Santa Rosa, of the State of Florida, to make to the governor, under oath, a report in writing of the facts.

Ib.

1275. Duty of governor.—It is the duty of the governor to make immediate inquiry into the facts, and if, on inquiry, there be found reason to suspect or believe that yellow fever exists in

either of the counties mentioned in the preceding section, to notify the judge of probate of the county of Escambia.

1276. Duty of judge of probate.—On receiving notice from the governor, it is the duty of the judge of probate to proceed at once to the exercise of all the authority with which he is invested by law, to prevent the introduction and spread of contagious or infectious diseases; to appoint such guards, and to establish such hospitals as he may deem necessary. Ib. sec. 2.

1277. Payment of expenses incurred.—The sum of one thousand dollars, or so much thereof as may be necessary, is appropriated annually to defray such expenses as may be incurred by the judge of probate, in the performance of the duty prescribed in the preceding section; and for such expenses the judge of probate must draw his order on the auditor, in favor of the person to whom payment is due; and if such order is approved by the governor, the auditor must draw his warrant on the treasurer for the payment thereof.* Ib. sec. 3.

1278 (1536). **State board of health.**—The Medical Association of the State of Alabama, organized in accordance with the provisions of the constitution adopted at the annual meeting of the association, held at Tuskaloosa in March, 1873, is constituted the state board of health.

1279 (1537). **Duties of state board of health.**—The state board of health must exercise a general superintendence and control over the county boards of health; must prescribe rules and regulations for the conduct of such boards, and must declare their duties; and must place themselves in communication with the hospitals, asylums and other like public institutions in the state; and must take cognizance of the interest of health and life among the people generally; must investigate the causes, and means of prevention of endemic and epidemic diseases; must investigate the influences of localities and employments upon the public health; and must act as an advisory board to the state in all hygienic and medical matters.

1280 (1538). **Report annually to the governor.**—The state board of health must, annually, make to the governor a report of their investigations and transactions during the preceding year, and the governor must cause such number of copies of such reports to be printed for distribution as he may deem necessary; in such report or reports, the board must make such suggestions as to legislative action as they deem advisable.

1281 (1539). **County boards of health.**—The county medical societies in affiliation with the Medical Association of the State of Alabama, and organized in accordance with the provisions of its constitution, are constituted boards of health for their respective counties, and are under the general superintendence and control of the state board of health.

1282. Duties of county board of health.—It is the duty of the county board of health,— Feb. 28, 1881, p. 76, sec. 1, 3.

1. To supervise the administration of the health laws of the state in the county, and especially the regulations made for the protection of the public health, and for the collection of vital statistics.

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* See act regulating "the practice of quarantine in Alabama," approved February 28, 1887.—Pamph. Acts 1886–7, p. 105.

2. To examine, as far as practicable, into all cases of malignant, pestilential, infectious, epidemic and endemic diseases occurring in the county, and the causes thereof, and to take such steps as may be necessary for their abatement and prevention.

3. To examine into all such nuisances as tend to endanger public health, and to take such steps as may be necessary for their abatement and prevention.

4. To exercise a general superintendence over the sanitary regulations of the public institutions situate in the county, including hospitals, asylums, work-houses, prisons, markets and public schools.

5. To supervise and regulate all matters pertaining to quarantine, quarantine physicians, the examination, detention and disinfection of vessels, railroad cars and other vehicles employed in the transportation of persons or freight; and for the examination and detention of all persons coming into the county, infected or suspected of being infected with contagious or infectious diseases, and of all persons, vessels, railroad cars, or other vehicles, or freights coming from places against which quarantine has been proclaimed.

6. To appoint a health officer for the county, and to do and perform such duties as are, or may be required of them by law.

1283. Report of county board.—The county board of health must make to the court of county commissioners, or the board of revenue, and to the state board of health, during the month of January of each year, a full and complete annual report of all the sanitary work done in the county, during the preceding year, by them or under their orders, which must contain all the vital and sanitary statistics of the county, together with such other information, suggestions and recommendations in regard to the public health as they may deem advisable, or may be, from time to time, required by the court of county commissioners, or board of revenue, or by the state board of health.

1284 (1541). **County, city, or town may invest county board of health with powers.**—The court of county commissioners, or the proper corporate authorities of any city or town, may, jointly or separately, invest the county board of health with such executive powers and duties as may be deemed necessary for the preservation and promotion of the public health, and for the prevention of the introduction or spread of contagious or infectious diseases; such powers to be exercised, and such duties to be performed under such rules and regulations as may be determined upon between such board and such court, or corporate authorities.

1285 (1542). **Sanitary regulations; expenses.**—In the exercise of such powers and performance of such duties, in the administration of all sanitary regulations, the appointment of officers or servants is reserved exclusively to the board of health; but the matter of expenditures is reserved exclusively to the court of county commissioners, or to the proper corporate authorities of the town or city.

1286 (1543). **No other local boards than county boards of health to be established.**—No local board of health, or executive medical body of any name or kind, for the exercise of public health functions, other than the county board of health, must be established in any county, town, or city.

1287. Health officer of county.—The county board of health must elect a health officer of the county, and fix the term of his office; such officer to be removable at the pleasure of the board. Feb. 28, 1881, p. 76, sec. 3.

1288. Bond; salary of health officer.—The health officer must enter into bond with sufficient sureties, payable to the judge of probate of the county, in a sum equal to twice the amount of his annual salary, with condition for the faithful performance of all such duties as are, or may be required of him by law; his salary shall be fixed by the court of county commissioners, or board of revenue, and must be paid annually from the county treasury, on the warrant of the judge of probate, or clerk, or secretary of the board of revenue. Ib.

1289. Duties of health officer.—It is the duty of the health officer,— Ib. secs. 4, 5, 7.

1. To keep, under such regulations as may be prescribed by the county board of health, a book to be styled register of births, in which he must register all births occurring in the county, reported to him, specifying, so far as reported, the sex and color of the child, the date of birth, the name or names of the parent or parents, with such other details as he may be required to enter; also a book to be styled register of deaths, in which he must register all deaths occurring in the county reported to him, specifying the date, cause and place of death, the name, age, sex and color of the deceased person, with such other details as he may be required to enter; also a book to be styled register of infectious diseases, in which he must register all cases of pestilential or infectious diseases occurring in the county reported to him, with such other details as he may be required to enter.

2. Under the direction and control of the county board of health, and in accordance with the health laws of the state, to exercise a general supervision over the sanitary interests of the county, and if discovering any cause of disease, or the existence of anything detrimental to the public health, to compel the removal thereof, so far as he is authorized by law; and if he have not authority of law to compel such removal, to make report to the county board of health of the particular facts, with such suggestions as to special action as he may deem advisable.

3. To make diligent inquiry into all cases of pestilential or infectious disease occurring in the county, coming to his knowledge, or of which he is informed, reporting the facts thereof to the county board of health, and employing all such means as he has authority to employ to prevent the spread of such disease.

4. To obtain, from time to time, at the expense of the county, necessary supplies of reliable vaccine matter, which, without charge, he must, on application, furnish to the practicing physicians of the county, and, when prepared, to vaccinate without charge all indigent persons of the county applying at his office.

5. To discharge such other executive health functions as are, or may be required of him by the county board of health.

6. To make to the county board of health such reports of his official transactions as they may require.

1290. Assistant health officers.—The county board of health shall also appoint such assistant health officers, and in such numbers, and distributed in such way through the county, as to them the public convenience may seem to require. These assistant health officers shall keep, severally, registers of births, Ib. sec. 6.

registers of deaths, and registers of infectious diseases of the same character as those required to be kept by the county health officers. Physicians, midwives, and other citizens may report births, deaths, and cases of pestilential or infectious diseases to an assistant health officer, instead of to the county health officer, whenever they find it more convenient to do so. The same regulations that may apply, from time to time, to reports made to the county health officers, shall also apply to reports made to an assistant health officer. An assistant health officer must make such reports of the births, the deaths, and the cases of pestilential or infectious diseases, registered by him, as the county board of health may, from time to time, prescribe; and must serve, without compensation, and may be at any time summarily removed by the county board of health.

Ib. sec. 5.

1291. Report of births.—It is the duty of a physician, midwife, or other person, attending any case of midwifery, or childbirth, within such time as may be fixed by the county board of health, to make to the county health officer a full report of such case, specifying, so far as known, the name or names of the parent or parents, their race and place of birth, the date of the birth, the sex and color of the child, with such other details as may be prescribed by the county board of health.

Ib.

1292. Report of infectious diseases.—It is the duty of every physician, attending or treating any case of pestilential or infectious disease, within such time as may be prescribed by the county board of health, to make a full report thereof to the county health officer, specifying the name of the patient, the locality within which such patient was or may be found, the character of the disease, and such other details as are, or may be prescribed by the county board of health. If a case of pestilential or infectious disease, not attended or treated by a physician, should occur, it is the duty of the head of the family in which it occurs, or of the person on whose premises it occurs, to make a like report thereof to the county health officer.

Ib.

1293. Certificate of death.—The county health officer must supervise all certificates of death, requiring them to conform to the rules of the county board of health; and must make such certificate, if otherwise a proper certificate cannot be obtained, notifying the coroner of all cases in which his intervention is necessary.

Ib.

1294. Report of death.—It is the duty of a physician, or midwife, or other person, having, at the time of death, charge of a sick person, to make to the county health officer, within such time as may be fixed by the county board of health, a full report of such death, specifying the name, age, sex, color, date, place, and cause of death, with such details as may be prescribed by the county board of health.

Feb. 12, 1879, p. 33.

1295. Annual appropriation to state medical association. For the purpose of carrying into execution the health laws, there is appropriated to "The Medical Association of the State of Alabama," annually, the sum of three thousand dollars, to be expended under its direction, and to be paid on the warrants of the auditor on the treasurer, on the requisition of the president of the association; and the association must render to the governor, annually, an itemized account of the expenditures of such appropriation.

CHAPTER 3.

PHYSICIANS; DENTISTS; DRUGGISTS.

1296 (1516, 1517, 1534). **Medical boards may be established by court of county commissioners.**—The court of county commissioners of any county, in which there is no board of medical examiners organized in accordance with the constitution of the Medical Association of the State of Alabama, and in affiliation with the association, may establish therein a medical board, to be composed of not less than three nor more than seven physicians of good standing, resident in the county; and such board shall have the authority hereinafter conferred; but the existence and authority thereof must terminate whenever a board of medical examiners is organized in the county in accordance with the constitution of the medical association of the state, and in affiliation with the association.

1297 (1518, 1519, 1526). **Authority and duty of such medical board.**—Such medical board must examine all applicants for a license to practice medicine in the county, and must examine all applicants for a license as a druggist, or to deal in drugs and medicines in the county. If the applicant for a license to practice medicine, on such examination, is found duly qualified, and is of good moral character, the board, on the payment of a fee of five dollars for the use of the board, must issue to him a license to practice medicine in the county, in any one or more of its branches; and if the applicant for a license as a druggist, or to deal in drugs and medicines, is found, on such examination, to be duly qualified, and is of good moral character, the board must issue to him a license, which is authority for him to pursue the occupation of a druggist, or to deal in drugs and medicines in the county.

1298 (1522). **Graduate of medical schools.**—A regular graduate of a medical college in the United States, having a diploma, is entitled to practice medicine, without license, in a county having only a medical board established by the court of county commissioners, upon the record of his diploma in the office of the judge of probate of the county; and for the record thereof, the judge of probate is entitled to a fee of one dollar.

1299 (1520). **License issued by such board to be recorded.** The license issued by such medical board, either for the practice of medicine, or for a druggist, or to deal in drugs or medicines, must be signed by the president of the board, countersigned by the secretary, if the board have a secretary, and must be recorded in the office of the judge of probate of the county; and for the record thereof, the judge of probate is entitled to a fee of one dollar.

1300 (1521). **License as evidence.**—The license or diploma, after the record thereof, is evidence of the authority of the person therein named to practice medicine, or as a druggist, or to deal in drugs or medicines, in the county; and if the original be lost, a certified copy of the record is sufficient evidence.

1301 (1530). **Authorized board of medical examiners.**—The board of censors of the Medical Association of the State of

Alabama, organized in pursuance of the constitution thereof adopted at Tuskaloosa, in March, 1873, and the board of censors of the several county medical societies in affiliation with the association, and organized in pursuance of its constitution, are constituted boards of medical examiners, having the authority, and subject to the duties hereinafter prescribed.

1302 (1528). **Certificate of qualification obtained.**—Without a certificate of qualification from an authorized board of medical examiners, except in the cases hereinbefore provided for, no person must engage in or pursue the occupation of a druggist, or deal in drugs and medicines, or practice medicine in any of its branches or departments, as a profession or means of livelihood.

1303 (1531). **Standard of qualification.**—The standard of qualification, the method or system, and subjects of examination, of druggists, or dealers in drugs or medicines, and of practitioners of medicine, shall be prescribed by the Medical Association of the State of Alabama, and must be observed by the board of medical examiners.

1304 (1532). **Certificate of qualification.**—It is the duty of the board of medical examiners, on application, to examine an applicant for a certificate of qualification, as a practitioner of medicine, according to the rules and regulations made by the medical association of the state, and if found qualified, and of good moral character, to issue to him a certificate of qualification. For such certificate no fee or charge must be made by the board of examiners; but any actual expenses necessarily incurred by the board in making or supervising such examination, not to include the personal expenses of any member of the board attending such examination, must be paid by the applicant.

1305 (1533). **Certificate may in certain cases be issued without examination.**—All physicians, druggists, or dealers in drugs and medicines, having license as hereinbefore provided, before the organization in the county of a board of medical examiners, are, on application to an authorized board of medical examiners, entitled to a certificate of qualification, without examination; and the physician is also entitled to have his name inscribed on the register of licensed practitioners of medicine.

1306 (1532). **Certificate of qualification and licenses to be recorded.**—The certificate of qualification, issued by an authorized board of medical examiners, is a license to the person to whom it is issued, for the purposes therein expressed, and confers authority to practice medicine, or as a druggist, or to deal in drugs or medicines, throughout the state. Such certificate must be recorded in the office of the judge of probate of the county in which the person to whom it is issued may reside at the time of the issue; and upon the record thereof, the judge of the court of probate must indorse thereon a certificate of the fact of record, which must be signed by him, and to which he must affix the seal of the court; and for the record and certificate he is entitled to a fee of one dollar.

1307. Proof of certificate.—Such certificate, the record thereof being certified by the judge of probate, is evidence of the authority of the person therein named to practice medicine,

or as a druggist, or as a dealer in drugs or medicines; and if the original be lost, a certified copy of the record is sufficient evidence.

1308 (1535). **Midwifery.**—The provisions of this chapter do not apply to women engaged in the practice of midwifery.

1309. Druggist, or dealer in drugs or medicines.—A druggist, or dealer in drugs or medicines, within the meaning of this chapter, is one whose occupation is the buying and selling of drugs or medicines, and the preparation or compounding thereof.

1310. Board of dental examiners.—A board of dental examiners is constituted. Such board is elected by the Alabama Dental Association, and holds office for the term of two years, and thereafter until their successors are elected and qualified. Vacancies occurring in the board are filled by appointment for the unexpired term, made by the president of the association. Feb. 11, 1881, p. 82, secs. 2, 3.

1311. Number and qualification of members of board.—The board consists of five members, graduates, or practitioners of dentistry, members in good standing of the Alabama Dental Association, who have for three years or more practiced in the state. Ib. sec. 2.

1312. Duty and authority of board of dental examiners. It is the duty of the board of dental examiners,— Ib. sec. 4.

1. To meet annually at the time and place of meeting of the Alabama Dental Association.

2. On the call of three members of the board, to hold special meetings at such time and place as may be appointed, giving to all known practicing dentists in the state, through the mail, thirty days' notice of such special meeting.

3. To grant licenses to practice, on application, to all dentists who may, before February 11th, 1881, have received licenses to practice from a medical board in this state, or to such as may present a diploma from an incorporated dental college. Such licenses to be granted without examination or fee.

4. To grant licenses to all other applicants who undergo a satisfactory examination, upon the payment of a fee of five dollars.

5. To keep a registry of the licensed practitioners of dentistry, a transcript from which, certified under the seal of the board by the officer having the custody thereof, shall be evidence of the license of any practitioner therein named.

6. To prescribe a course of reading for students of dentistry under private instruction.

1313. Temporary license.—One member of the board of dental examiners may grant license to practice, which is operative until the regular meeting of the board; but such temporary license must not be granted to an applicant who has been previously rejected by the board. Ib. sec. 7.

1314. License recorded.—The license, other than a temporary license, must be signed by the president of the board of examiners, and countersigned by the secretary, if the board have a secretary, and must, within thirty days after the grant thereof, be filed in the office of the judge of probate of the county of the residence of the person to whom it is issued, and must be therein recorded; and after record thereof, the judge must thereon indorse and certify under the seal of the court the fact of record; and for the record and certificate, the judge of probate is entitled to a fee of one dollar. Ib. sec. 10.

1315. Proof of license.—The license, certified by the judge

of probate, is evidence of the authority of the party therein named to practice dentistry; and if the same is lost, a copy of the record, duly certified, is sufficient evidence.

Ib. sec. 1.

1316. Dentistry must not be practiced without license. It is not lawful to engage in the practice of dentistry without a license from the board of dental examiners.

Ib. sec. 6.

1317. Quorum of board of dental examiners.—Three members of the board of dental examiners constitute a quorum for the transaction of business; and if a quorum is not present on the day appointed for a regular or special meeting, so many as are present may adjourn from day to day for five successive days until a quorum is present.

1318 (1524, 1526). **Contracts for medical or dental service, or purchase of drugs or medicines void, when.**—Every contract or agreement, express or implied, the consideration of which is the service of a physician, surgeon, or dentist, or the sale of drugs or medicines, is void, unless the physician, surgeon, or dentist, or the seller of such drugs or medicines has authority to practice medicine, or dentistry, or as a druggist, or to deal in drugs or medicines, obtained according to the provisions of this chapter; but proof of such authority must not be required, unless two days' notice to make the same is given before the trial.*

CHAPTER 4.

RETAILERS.

As amended, Feb. 2, 1883, p. 37.

1319 (1544). **Mode of obtaining license to retail.**—A license to retail spirituous or vinous liquors must not be granted until the applicant produces to the judge of probate a recommendation in writing, signed by twenty respectable householders and freeholders residing within the corporate limits of the town, or city, or precinct, in which he proposes to engage in the business of retailing, stating that they are acquainted with him, that he is of good moral character, and is in all respects a proper person to be licensed. But if there be not within the precinct twenty resident householders and freeholders, the recommendation must be signed by a majority of the householders and freeholders residing therein.

Russell v. State, 77 Ala. 89; Grider v. Tally, 77 Ala. 422; Dunbar v. Frazer, 78 Ala. 538.

As amended, Feb. 1, 1883, p. 36.

1320 (1545). **Affidavit required before grant of license.** Before the grant of license the applicant must, before an officer authorized to administer and certify affidavits, take and subscribe the following affidavit: "I, ———, do solemnly swear that I will not knowingly sell or give away any spirituous or

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* The provisions of the statutes incorporated in this chapter, relating to the practice of dentistry, and to druggists and the sale of drugs, have been changed by an act entitled "An act to amend an act entitled an act to regulate the practice of dentistry in the State of Alabama, approved February 11, 1881," which was approved February 28, 1887, and by an act entitled "An act to regulate the practice of pharmacy and the sale of poisons in cities and towns of more than one thousand inhabitants, in the State of Alabama," approved February 28, 1887. See Pamph. Acts 1886–7, pp. 97 and 106.

vinous liquors to any minor, or person of unsound mind, without the permission of his or her guardian or parent, or to any person of known intemperate habits; that I will not keep open store on Sunday, for the purpose of carrying on business for which license is sought, or violate the statute prohibiting the disposition of agricultural products between the hours of sunset and sunrise; nor will I suffer the same to be done knowingly by any partner, clerk, agent, or any other person, in or about my premises, if in my power to prevent the same; and that I will not allow any gaming of any kind on or about my premises." And such affidavit must be filed in the office of the judge of probate.

Russell v. State, 77 Ala. 89.

1321 (1546). **License to be produced to recover judgment for liquors retailed in quantities less than a quart.**—No person must obtain a judgment in any court of this state, upon any account, any item of which is for vinous or spirituous liquors in less quantity than one quart, without producing to the court a license showing his authority to retail at the date of such item.

Rasberry v. Pulliam, 78 Ala. 191.

1322 (1547). **Justice to apprehend and bind over offenders.**—All magistrates, whenever they have good reason to believe, or whenever informed on oath, that any person has violated any of the provisions of this chapter, must forthwith issue a warrant against such person, and bind him over to answer therefor, to the next term of the circuit court.

1323 (1548). **Sale or exchange void.**—All sales, or contracts or agreements to sell or exchange spirituous, vinous, or malt liquors, are void, if the seller or party making the exchange has not a license authorizing him to engage in business as a retailer or wholesale dealer; and all sales or exchanges of such liquors, with or without such license, to or with a minor, or a person of unsound mind, without the consent of the parent or guardian of such minor or person of unsound mind, or to or with a person of known intemperate habits, not made upon the requisition in writing of a physician for medicinal purposes, are void.

CHAPTER 5.

INNS; HOTELS.

1324 (522). **Hotel and inn-keepers must be licensed.**—All keepers of a public inn or hotel must obtain license from the judge of probate of the county in which such inn or hotel is situate, and must pay to the judge such tax or the price of such license as is by law imposed.

1325. Liability of inn or hotel-keepers.—In the absence of a special contract, as is authorized in the succeeding section, the rights of guests, and the liability of the keeper remain as at common law.

1326 (525). **Special contract between inn or hotel-keeper and guest authorized.**—The keeper of a public inn or hotel may require any guest, or person proposing to become a guest, to

enter into a special contract as to the kind and place of board, entertainment, or lodging to be furnished such guest, and the price therefor to be paid; and if such guest refuses to enter into such contract and to accept such board, entertainment, or lodging at the price proposed, as the keeper may offer, the keeper may refuse to receive or to entertain such guest, and because of such refusal shall not incur any liability whatever. Such special contract must be in writing, signed by both parties; and thereby the inn or hotel-keeper may limit his liability for the safety of the goods of such guest, as it is defined or declared by the common law.

Beale v. Posey, 72 Ala. 323; Lanier v. Youngblood, 73 Ala. 587.

1327 (1549). **Keep safes and post up notices.**—Every keeper of a public inn or hotel in a city must provide himself with an iron chest, or other safe depository for valuable articles belonging to his guests and customers, and must keep posted up on his doors and other public places in his house of entertainment, written or printed notices to his guests and customers, that they must leave their valuables with the landlord, his agent, or clerk, for safe-keeping, that he may make safe deposit of the same in the place provided for that purpose.

Beale v. Posey, 72 Ala. 323; Lanier v. Youngblood, 73 Ala. 587.

1328 (1550). **Not liable for articles not deposited.**—Such hotel or inn-keeper as shall comply with the requirements of the preceding section, shall not be liable for any money, jewelry, watches, plate, or other things made of gold or silver, or of rare and precious stones, or for other valuable articles of such description as may be contained in small compass, which may be abstracted or lost from any such public inn or hotel, if the same shall not be left with the hotel or inn-keeper, his clerk, or agent for deposit, unless such loss shall occur through the fraud of the hotel or inn-keeper, or some clerk or servant employed by him in such inn or hotel.

1329 (1551). **Liability or failure to comply.**—Any hotel or inn-keeper, who shall refuse or neglect to comply with the requirements of section 1327 (1549), shall not be entitled to the exemptions and benefits contained in the preceding section, but shall, in all respects, be liable as at common law.

CHAPTER 6.

ESTRAYS AND ANIMALS RUNNING AT LARGE.

ARTICLE 1.—Estrays.
2.—Stallions and jackasses running at large.

ARTICLE I.

ESTRAYS.

1330 (1552). **Estrays may be taken up.**—Every person in this state, finding any horse, mare, mule, jack, or jenny, any neat cattle, hog, or sheep running at large about his residence

or plantation, or the residence or plantation of which he has charge, the owner of which is unknown, may take up such animal as an estray.

N. & C. R. R. Co. v. Peacock, 25 Ala. 229; M. & O. R. R. Co. v. Williams, 53 Ala. 595.

1331 (1553). **Neat cattle not to be taken up at certain seasons; exceptions.**—No neat cattle, except cows with young calves, sheep, or hogs, must be taken up as estrays between the first days of April and November.

1332 (1554). **Oath of taker.**—Every person taking up an estray must, within three days thereafter, make oath before some justice of the county in which such estray was found, that the same was taken up about his plantation or residence, or about the plantation or residence in his charge, and that the marks or brands have not been defaced or altered since taking up.

1333 (1555). **Appraisement and certificate.**—Such justice must thereupon issue his summons to two disinterested householders, directing them, after being sworn, to appraise the estray at a fair valuation, to certify such valuation in writing with a particular description of the estray, by the kind, size, mark, color, stature and age; which certificate, signed by them and attested by the justice, must be returned to the judge of probate within ten days thereafter.

1334 (1556). **Certificate entered by judge of probate.**—The judge of probate must enter such certificate, and the name of the person taking up the estray, in a book to be kept for that purpose.

1335 (1557). **If two estrays taken up at same time.**—If two or more estrays of the same kind are taken up at the same time, by the same person, they must be included in the same summons, certificate of appraisement and entry.

1336 (1558). **Bond to be given.**—Every person taking up an estray must, on the return of the certificate of appraisement to the justice, give bond with surety, to be approved by him, in a sum equal to the appraised value of the estray, payable to the county, and conditioned that if the owner thereof, in one year thereafter, prove his property in such estray, and pay all legal costs and expenses, he will deliver up the same; and if the owner fails to prove his property within a year, he will pay to the county one-half of such appraised value.

1337 (1559). **Justice returns bond to judge of probate.** The justice must return such bond to the judge of probate, with the appraisement and valuation of the estray.

1338 (1560). **Horses, etc., appraised at more than twenty dollars; advertising fee.**—If the estray be a horse, mare, mule, jack, or jenny, and is appraised at more than twenty dollars, the person taking up such an estray must pay to the justice two dollars, which must be paid to the judge of probate on the return to him of the certificate of appraisement, for the expenses of advertising, as hereinafter provided.

1339 (1561). **Neglect of duty by justice.**—Any justice, failing to return the certificate of appraisement within the prescribed time, or to pay the printing fees, according to the provisions of the preceding section, forfeits one hundred dollars,

one-half to the person suing for the same, the other to the use of the county.

1340 (1562). **When advertised in newspaper.**—Where the estray is a horse, mare, mule, jack, or jenny, and appraised at more than twenty dollars, the judge of probate must, on the return of the appraisement and the payment of the sum hereinbefore provided for, advertise such estray in some newspaper of his county for three successive weeks; and if no newspaper is published therein, then in the paper nearest thereto.

1341 (1563). **Sum not sufficient for advertisement, judge posts notice.**—If the sum specified is not sufficient to procure the publication as required by the preceding section, such judge must cause the same to be advertised by posting notice at three public places in the county, and pay the amount received by him for the purpose of publication into the county treasury.

1342 (1564). **Contents of advertisement.**—The advertisement must contain the name of the person by whom the estray was taken up, and the time when, the appraised value, description of the animal, and the name of the justice before whom the proceedings were had.

1343 (1565). **Lists of estrays to be posted.**—Such judge must also make out a list of all estrays, and post up the same at the court-house door on the first day of each term of the circuit court, which list must show all estrays taken up within twelve months preceding such day, and not restored to their owners.

1344 (1566). **Estrays required to be advertised, brought to court-house first day of court.**—All estrays, required by this chapter to be advertised in a newspaper, must be brought to the court-house of the county in which they were taken up, on the first day of the circuit court next after such taking up.

1345 (1567). **Death or escape of estray.**—When the estray dies, or escapes without fault on the part of the taker, and after the same is appraised, he must report the same to the judge of probate within ten days thereafter, making oath that such death or escape was without his fault; and such judge must make an entry thereof in the margin where the certificate of appraisement is entered, and must not advertise or include such estray in the list posted up at the court-house door.

Clerk v. Anderson, 11 Ala. 410; Hudgins v. Glass, 34 Ala. 110.

1346 (1568). **Proceeding as required, taker discharged from liability.**—Upon proceeding as required by the preceding section, the taker is, on the escape or death of the estray, discharged from all liability.

1347 (1569). **Ownership; how established.**—If the owner of any estray, within one year from the execution of the bond given under section 1336 (1558), claim the same, he must notify the taker and satisfactorily establish his claim before a justice of the county, either by his own, or the oath of another person.

1348 (1570). **Order of delivery.**—Such justice, if satisfied of the ownership of the estray, must make an order in writing, requiring such estray to be delivered to such owner, on his paying the legal costs which have accrued, and compensation for keeping.

1349 (1571). **Estray not to be used until bond is given.** No person must work any estray, except by riding the same to the justice for the purpose of taking the oath required by section 1332 (1554.), until he has given the bond required by this article.

1350 (1572). **Penalty.**—Any person, using an estray contrary to the provisions of the preceding section, forfeits one hundred dollars, one-half to the use of the person suing for the same, the other to the use of the county.

Smith v. Ewers, 21 Ala. 38; Butler v. Cook, 14 Ala. 576.

1351 (1573). **No charge for keeping, if worked.**—No person must make any charge for keeping an estray which has been used or worked while in the possession of the taker, except by riding the same to the court-house for exhibition, and to the justice for the purpose of taking such oath; and any person violating this section forfeits the appraised value of such estray to the person suing for the same.

1352 (1574). **Pay for keeping; how determined.**—For the keeping of estrays, if not worked or used, the taker is entitled to a reasonable compensation, if the parties cannot agree, to be determined by the justice before whom the owner proves the property, and if either party is dissatisfied with his decision, by any two disinterested householders, who may be appointed by such justice, with liberty to call in an umpire, whose decision is final.

1353 (1575). **Not to be injured or killed.**—No person taking up an estray must intentionally injure, kill, or dispose of the same, until after the expiration of the time that the owner has the right of proving his property therein.

1354 (1576). **Penalty.**—Any person, violating the provisions of the preceding section, forfeits to the owner double the appraised value of the estray.

Simpson v. Talbot, 25 Ala. 469.

1355 (1577). **On failure to claim title one year after execution of bond, forfeited to taker.**—If the owner of the estray does not appear and prove his property therein, in one year after the execution of the bond given under section 1336 (1558), he forfeits his right thereto, and the property is vested in the taker of the same.

1356 (1578). **One-half the value to be paid to the county.** If the estray is not proved in one year from the execution of such bond, the person taking up the same must pay to the judge of probate of the county in which such estray was taken up, one-half of the appraised value of the same, for the use of the county, in discharge of his bond.

1357 (1579). **If not paid, execution issues on the bond.** After the expiration of such year, if the order of the justice requiring the taker to return the estray to the owner, with his receipt thereon, is not filed with the judge of probate, or the one-half of the appraised value of the estray paid to him, he must issue an execution on such bond, in the name of the county, against the obligors thereto, for one-half of such appraised value and costs, returnable to any regular term of the court of probate, to be holden within three months.

1358 (1580). **Death of taker.**—If the taker dies before the

expiration of the time allowed by this article to the owner of the estray to prove his property, the provisions in relation to giving up such estray to the owner apply to his legal representatives.

ARTICLE II.

STALLIONS AND JACKASSES RUNNING AT LARGE.

1359 (1581). **Stallions and jacks, when taken up; advertisement and fees.**—If any stallion, or jackass, over two years of age, is found running at large, such animal may be brought before any justice of the county, who must cause the same to be advertised, with a description of his marks, color, size and age, with the name of the taker, in three public places in the county; and the taker is entitled to receive five dollars from the owner, and a reasonable compensation for keeping, to be determined as in the case of estrays, and the justice one dollar.

1360 (1582). **If not claimed.**—If such stallion or jackass is not claimed within three months after being taken up, and the amounts specified in the preceding section paid within that time, the taker, or any other person, may geld such animal at the risk of the owner.

CHAPTER 7.

MARKS AND BRANDS.

1361 (1583). **Ear-marks and brands.**—Every person in this state, owning any cattle, hogs, sheep, or goats running at large, must have an ear-mark or brand different from that of his neighbors.

1362 (1584). **Recorded in the office of probate judge.**—Such marks and brands must be recorded in the office of the judge of probate of the county in which such cattle, hogs, sheep, or goats run; but the same brand or mark must not be recorded to more than one person in the county.

1363 (1585). **Books open to inspection.**—When a dispute occurs as regards a brand or mark, the person who has first recorded the same is entitled thereto; and the judge of probate must allow all citizens of the county to inspect, without charge, the book in which the marks or brands are recorded.

CHAPTER 8.

ENCLOSURES, TRESPASSING ANIMALS AND PARTITION FENCES.

Amended, Jan. 23, 1879, p. 75.

1364 (1586). **Lawful fence defined.**—All enclosures and fences must be made at least five feet high, and if made of rails, the rails not more than four inches apart from the ground to the height of every two feet, or, if made of palings, the palings not more than three inches apart, or if made with a ditch, such

ditch must be four feet wide at the top, and the fence, of whatever material composed, at least five feet high from the bottom of the ditch, and three feet high from the top of the bank, and so close as to prevent stock of any kind from getting through; but a rail fence five feet high, with the rails not more than eighteen inches apart from the ground to the height of every three feet, shall be a lawful fence so far as cattle, horses and mules are concerned.

1365 (1587). **No trespass, if fence not a lawful one; penalty for injury to cattle.**—If any trespass or damage is done by any animal breaking into lands not enclosed as in the preceding section is provided, the owner is not liable therefor; and if any person injures or destroys any such animal, he is liable to the owner for five times the amount of injury done, to be recovered before any court of competent jurisdiction.

Smith v. Causey, 22 Ala. 568; Tankersly v. Wedgworth, Ib. 677; Jean v. Sandiford, 39 Ala. 317; McKenzie v. Gibson, 73 Ala. 204.

1366 (1588). **Penalty for setting stakes, pits, etc.**—If any person, not having a fence as herein prescribed, sets in his enclosure any stakes, pits, poison, or anything which may injure or kill any animal or stock, such person forfeits fifty dollars for every such act to any person suing for the same; and any stakes, pits, or poison on any such lands are presumptive evidence that the same were set by the person in charge of such land.

1367 (1589). **Damages for trespass by cattle.**—If any stock trespass upon any lands enclosed as herein prescribed, the owner of such stock must pay the damages; and for each trespass after the first, double damages.

1368 (1590). **Remedy.**—Upon complaint made before any justice of the precinct, he must immediately issue an order in writing to three disinterested householders of the neighborhood, not related to either of the parties, reciting the complaint, and directing them to examine the fence, ascertain its condition, and report the same in writing to the justice; and such report is evidence of the condition of the fence.

1369 (1591). **Assessment of damages.**—The householders appointed under the preceding section must also assess the damages, or double damages, as the case may be; and if the party pays such damages, or tenders the same to the party injured, it is a bar to any action for such trespass.

1370 (1592). **Owners of adjoining lands bear equal proportion of expense in repairing, etc., partition fences.**—Partition fences between improved lands are to be erected and repaired at the joint expense of the occupants; or if any person makes a fence a partition fence by joining to or using it as such, he must pay to the person erecting it his proportion of the expense, taking into consideration the condition of such fence at the time it is so joined to or used.

Walker v. Watrous, 8 Ala. 493; Moore v. Levert, 24 Ala. 310; Henry v. Jones 28 Ala. 385.

1371 (1593). **Assessment of value of partition fence.**—If the parties cannot agree, on application by either to a justice of the precinct in which such fence is, such justice must issue an order to three disinterested freeholders of such precinct,

not related to either of the parties, to examine such fence, and to ascertain the amount to be paid to the owner erecting the same; and such freeholders, on a day to be by them appointed, of which both parties must have notice, must examine such fence and report to the justice the proportionate amount to be paid to the person erecting the fence; and if such amount is not paid within ten days after such report, the justice must issue execution therefor, with costs, as provided in the following section, to be collected and returned as other executions.

1372 (1594). **Costs.**—The justice is entitled to fifty cents for issuing the order, and the fence-viewers to one dollar each; one-half of which is to be paid by each party; and not being paid in ten days after the report, execution must issue therefor, with costs for issuing such execution.

1573 (1595). **Oath of viewers.**—The fence-viewers, before proceeding to act, must take an oath, which may be administered by one to the other, to discharge their duties fairly and impartially.

1374 (1596.) **Where adjacent owners agree to keep up separate parts of partition fence.**—Where a partition fence has been, or may hereafter be established by agreement of adjacent owners of land, each to keep up a particular part of such fence, if either fails to keep such part assigned to him in good repair, it shall be lawful for the other joint owner to repair such fence, the cost thereof to be paid by the one so failing; and if they cannot agree as to the amount to be paid for such repairs, the same to be ascertained and collected as provided by the preceding sections.

1375 (1597). **Partition fences defined.**—Partition fences, within the meaning of this chapter, are fences erected on the line between lands owned by different persons.

CHAPTER 9.

MILLS AND MILLERS.

1376 (1598). **Rotation in grinding.**—The owners and keepers of public mills, and their employes, must grind the grain brought to their mills in rotation, as it is received, and as well as the condition of the mill and water will permit; and may take and receive for toll one-eighth of the grain, and no more; but nothing in this section is to be so construed as to prevent the owner of any mill from grinding his own grain at any time.

1377 (1599). **Public mills defined.**—All grist mills, which grind for toll, are public mills, within the meaning of this chapter.

CHAPTER 10.

KILLING ANIMALS BY FIRE-HUNTING, AND STOCK BY DOGS.

1378 (1600). **Fire-hunters liable for killing stock.**—If any person hunting deer by fire, in the night-time, kills any horse, mare, colt, or other domestic animal, he is liable to double damages, at the suit of the owner of the property.

1379 (1601). **Liability on account of dogs killing stock, and killing the dogs.**—No person must keep any dog which has been known to kill or worry sheep, or other stock, without being set upon the same; and any person knowingly keeping such dog is liable for double the value of all stock killed or injured by such dog, to be recovered by the owner of such stock before any court of competent jurisdiction; and no action shall be maintained against any one for killing such dog.

CHAPTER 11.

TO PREVENT INJURY FROM GUNPOWDER.

1380 (1604). **Magazine to be built.**—It is the duty of the corporate authorities of every city or town corporate within the state to provide a suitable fire-proof building without the limits of the town or city, for the storage of gunpowder or other explosive material, on such terms as the corporate authorities may prescribe.

CHAPTER 12.

FIRE INSURANCE PATROL.

1381 (1605). **Organization and powers of fire insurance patrol.**—Fire underwriters and insurance agents of any city may provide a patrol of men, and superintendent and accommodations and apparatus therefor, to prevent and extinguish fires, and to save property or life endangered by fire; such patrol and superintendent may for such purposes enter a building on fire, or in danger of taking fire, subject to the control of the chief engineer or fire marshal.

1382 (1606). **How patrol maintained.**—Annually, in January, or as soon thereafter as practicable, there shall be held, after ten days' notice in a daily newspaper of such city, a meeting of underwriters and agents engaged in fire insurance business in such city, at which each underwriter and agent is entitled to one vote. A majority vote shall determine as to the maintenance of such patrol, and fixing the expenses thereof for the next year, not to exceed two per cent. of all premiums (except on cotton) reported, as provided in the next succeeding section,

and assess the same proportionally to the premiums (except on cotton) reported by each underwriter or agent, determining the time of payment. Such assessment is collectible in any court of competent jurisdiction, on suit of a person designated by such underwriters and agents for that purpose.

1383 (1607). **Semi-annual report of premiums collected.** At such meetings the fire underwriters and agents may require a semi-annual statement, under oath, of fire premiums received for insuring property in such city (except on cotton), to be made to any person they may designate, on the first days of January and July, by each fire underwriter or agent in such city.

1384 (1608). **Penalty for failure to make report; how suit brought.**—The person so selected may, in writing, demand such report within ten days after the first days of January and July; and any underwriter or agent, who neglects to render such statement for fifteen days after such demand, shall forfeit fifty dollars for the use of such fire-patrol fund, and also twenty-five dollars for each additional day of neglect, to be computed to the day of trial, to be recovered on suit of such person so selected, in any court of competent jurisdiction.

CHAPTER 13.

PLANTING OF OYSTERS.

As amended, Feb. 12, 1879, p. 66.

1385 (1617). **Right of planting oysters.**—The owner of any lands fronting on any bay, river, haven, bayou, or creek within this state, are granted the right to plant oysters, and gather the same, in the manner prescribed by law, in the waters in front of their lands, to the distance of six hundred yards from the shore; but where the distance from shore to shore is less than twelve hundred yards, the owners on either shore may so plant and gather to a line which is equidistant between the two shores; but neither of such owners, or other person, shall plant in the channel of such bay, river, haven, bayou, or creek, or so near thereto as to affect or injure the same. The respective owners shall plant within lines extended into the water from the points where their boundaries intersect the shore, as nearly as practicable, with a mean width corresponding with their respective frontages on the shore; but should the lines thus extended cross each other, or seriously interfere with obtaining such a mean width, then a line equidistant from the shore lines of the respective owners shall be the boundary between such planting grounds. Nothing shall be done to impede or obstruct the navigation of such bay, river, haven, bayou, or creek, or in anywise impair the riparian rights of the state, or its title to the same as overflowed lands; but upon the assertion of the rights of the state, the owners of such oysters shall have the right to remove them.*

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* Sections 1609 to 1616, of Code of 1876, inclusive, transposed to Criminal Code.

1386 (1618). **When taking up for planting prohibited.**—It is not lawful for any person to take up from their natural beds any oysters about the shores of the bay of Mobile, or in the same, for the purpose of planting and bedding the same, between the first of May and the first of September in each year.

CHAPTER 14.

ROADS, BRIDGES, FERRIES AND WATER-COURSES.

ARTICLE 1.—Public roads.
2.—Private roads.
3.—Bridges, causeways and ferries.
4.—Water-courses.

ARTICLE I.

PUBLIC ROADS.

1387 (1619). **Superintendence of roads by county commissioners.**—The court of county commissioners of the several counties is invested with a general superintendence of the public roads within their respective counties, and may establish new, and change and discontinue old roads, in the manner hereinafter provided.

Hill v. Bridges, 6 Port. 197; Moore v. Hancock, 11 Ala. 245; Parnell v. Commissioners, 34 Ala. 278; Commissioners v. Bowie, Ib. 461; Creswell v. Commissioners, 24 Ala. 282; Commissioners v. Hearne, 59 Ala. 371.

1388 (1620). **Grades for public roads.**—Public roads are of three grades, the first, thirty feet wide, with bridges and causeways fifteen feet wide, the second, twenty feet wide, with bridges and causeways fifteen feet wide, and the third, fifteen feet wide, with bridges and causeways ten feet wide; all grades to be cleared of trees and other obstructions, the stumps to be cut within six inches of the ground; and lanes through plantations of such width as may be prescribed by the court, not exceeding thirty feet.

1389 (1621). **New road, or change of road.**—No public road can be established, changed, or discontinued, except on application to the court of county commissioners.

1390 (1622). **Petition; notice.**—Such application must be by petition; and at least thirty days' notice of the intended application must be given by advertisement at the court-house door, and at three other public places in the county, two of which shall be in the immediate neighborhood of the road to be established, changed, or discontinued.

Commissioners v. Hearne, 59 Ala. 371.

1391 (1623). **Viewers appointed to mark out road and assess damages.**—When a new road is to be established, or an old road changed, the court must issue an order to seven disinterested householders of the county, to view and mark out the best route for such proposed road, and to assess the value of the land of each land-owner that will be taken, if the road is opened over the route marked out.

1392 (1624). **Viewers' oath, return, etc.**—The viewers, before acting, must take an oath to view and mark out the road described in the order, to the greatest advantage to the public, and with as little prejudice to individuals as possible, and without partiality or favor; and to justly assess the value of the land of each land-owner, which will be taken for said road; and must, after viewing and marking out the route and making the assessment of compensation that each land-owner will be justly entitled to, if his lands are taken for said road, return the same to the court; whereupon the court must cause a notice to be served on the owner or owners of each tract or parcel of land, over which the road has been marked out, showing the route marked out, the quantity of land that will be taken from said owner, if the road is opened, and the amount of compensation that the viewers report should be paid to said owner; and appointing a day on which the court will hear any objections to said report, or to any valuation therein shown.

1393 (1625). **Hearing of objections to report and valuation; accepting route; opening road, etc.**—On the day appointed, the court must hear any objection made to the route marked out, or to the amount of compensation which the viewers have reported should be paid any land-owner for the land which will be taken up by said road, if opened, and may increase said compensation to such an amount as they deem just; and may accept the route and confirm the report, or may reject the route and set aside the report. If the court accept the route, and confirm the report, and no appeal is taken from that order and judgment, within the time hereinafter prescribed, the court must cause the compensation adjudged to the land-owner to be paid or tendered to him; and must thereupon make an order for the opening of such road; but a road must not be opened between the first day of March and the tenth day of July in any one year, nor over any land while a crop is growing thereon, unless the crop was planted after the order was made, nor during the pendency of an appeal provided for herein.*

1394. Appeal by owner of land.—The owner of the lands, if dissatisfied with the assessment of damages made by the jury, is entitled, as of right, to an appeal therefrom to the circuit court of the county, and on such appeal to a trial de novo by jury; such appeal to be taken at the term of the court of county commissioners to which the assessment of damages is certified, on giving security for the costs thereof, to be approved by the judge of probate; and on the giving of such security, the judge of probate must file in the office of the clerk of the circuit court a full and complete transcript of all the proceedings had in the court of county commissioners, including the certified assessment of damages.

1395 (1629). **Who liable to do road duty.**—All persons are liable to work on the public roads, except those exempted by the following section.

1396 (1630). **Persons exempt.**—All females and all male persons under the age of eighteen years, and over forty-five years of age, and all maimed or disabled persons, who shall procure

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* Sections 1391 to 1393, inclusive, rewritten by joint committee.

certificate of such disability from some licensed practicing physician, are exempt from working on public roads.

1397 (1631). **Extent of liability to work.**—No person or hand is liable to work any public road, every part of which is distant more than six miles from his residence; or to work more than ten days in any one year, not counting the days engaged in opening new roads.

1398 (1632). **Road precincts apportioned, and overseers.** For the purpose of keeping roads in repair, the court of county commissioners, at its first term in every second year, must divide the county into a convenient number of road precincts, and must, at the same court, appoint three apportioners for each election precinct, which apportioners shall forthwith proceed to appoint an overseer to each road precinct; such overseer must be between the ages of twenty-one and forty-five years; and the apportioners must return a list of overseers appointed by them to the probate judge of their county, within thirty days after their appointment, who shall issue commissions as prescribed by law.

Allison v. State, 60 Ala. 54.

1399 (1633). **Term of apportioners and overseers.**—Apportioners and overseers must not serve longer than two years from the day of appointment. As amended, Feb. 13, 1879, p. 77.

1400 (1634). **Vacancy in office of apportioners.**—On failure of the court to act, or in case of vacancy, the judge of probate appoints apportioners, who hold for the unexpired terms.

1401 (1635). **Apportioners fill vacancies in office of overseer.**—The apportioners must fill all vacancies in the office of overseer in their respective precincts.

1402 (1636). **Oath of apportioners.**—Apportioners, before entering on their duties, must take an oath faithfully to discharge all their duties, to the best of their skill and judgment, without partiality or favor.

1403 (1637). **When new roads established.**—When a new road is established, such road must be divided into precincts; overseers appointed for each precinct, who hold until the term fixed for the appointment of overseers for the county; and an order directed to such overseers, issued by the judge of probate, directing the opening of the road through their precinct, which must be served by the sheriff and returned, as hereinafter provided for the service and return of copies of appointment on overseers.

1404 (1638). **Copy of the order of appointment to be furnished sheriff.**—The judge of probate must, within ten days after the appointment of overseers and apportioners, furnish the sheriff with a copy of the order of appointment.

1405 (1639). **Statement to be attached to copy for apportioners.**—The copy of the order appointing apportioners must be accompanied with a statement, signed by the judge, of the overseers on any road precinct within their election precinct; a description of such road precinct, with the names and grades of the road assigned to such overseer.

1406 (1640). **What the order for overseers must show.** The copy of the order appointing overseers must contain a description of his precinct and grade of the road, and be accompanied by a statement of the names of the apportioners of the

election precinct or precincts through which any part of the road assigned to him passes.

1407 (1641). **Notice to overseers and apportioners; when and how served.**—The sheriff must, within thirty days after the delivery to him of such copies and statements, deliver a copy of each to the apportioners and overseers, if practicable, and if not, leave the same at their residence and return the original, with his indorsement of service, to the judge of probate.

1408 (1642). **Valid from time of service.**—A service of the copy of such appointments and statements, although not made within the time prescribed, is valid from the time of service.

1409 (1643). **Excuse or resignation.**—Any person appointed apportioner, or overseer, may send his excuse for not accepting, or after he has accepted, may resign his appointment, to the judge of probate.

1410 (1644). **What the excuse or resignation must show.** Such excuse or resignation must be in writing, the causes for not accepting, or the reasons for resigning stated, and must be sworn to.

Allison v. State, 60 Ala. 54.

1411 (1645). **Excuse or resignation; how passed on.**—The judge of probate, with the concurrence of the court of county commissioners, may pass upon the sufficiency of such excuse or resignation of any person for not accepting the appointment of overseer, or of any person who may resign his commission as overseer of any road in their respective counties.*

1412 (1646). **Duties of apportioners.**—It is the duty of the apportioners,—

1. To make a list of all persons and hands within their precincts, subject to work on public roads, within fifteen days after being served with a copy of their appointment, and to correct such list from time to time as may be necessary during their term.

2. Within twenty days after such service, to apportion such persons and hands among the overseers, any portion of whose road is within their precinct, impartially according to the portion of such road within their precinct, the grade of the same, and its importance to the public; and to change such apportionment from time to time as a due regard to the public interest may require.

3. To provide each overseer in the precinct, within five days after any apportionment, with a correct list of the persons and hands apportioned to him.

4. To inspect, from time to time, the public roads within their precinct, notice the character of the repairs, and observe if such road is regularly posted, and direction boards put up as required by law.

5. To appoint one of their number to attend court, and report to the grand jury any overseer who has, in any particular, failed to discharge his duty upon any road or portion of road within his precinct.

Williams v. State, 45 Ala. 55.

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* Latter part of section transposed to Criminal Code.

6. To see that all defaulters are prosecuted for not working.

7. To discharge the same duties in reference to bridges built under contract with the court of county commissioners, and in reference to persons violating section 1456 (1692) of this Code, which are mentioned in the three subdivisions next preceding.

1413 (1647). **Hands to be apportioned on nearest road.**—The apportioners must apportion all persons and hands to work on the road nearest them, if it can be done with a due regard to the public interest. *

1414 (1649). **Duties of overseer.**—It is the duty of overseers of public roads,—

1. On the apportioners failing to furnish a list of persons and hands, within the time prescribed, to apply for, and, if possible, obtain the same.

2. To call out the persons and hands subject to work on their road precinct, at their discretion, and to work with the same ten days in the year, if such number of days' work is necessary to keep their precinct in good repair.

3. To measure, within three months after being notified of their appointment, their respective precincts in continuation, and to set up, at the end of each mile, neat and permanent mile-posts, marked with the number of miles to the court-house, or other noted place to which the road leads.

4. Where the road in their precinct forks or turns out, or crosses another public road, to erect within the same index-boards, with proper directions, pointing towards the place to which such turn-out, fork, or cross-road leads.

5. To build bridges and causeways whenever the same are necessary, unless the court of county commissioners deem it expedient to have the same built by contract.

6. Where a space is left on the continuation of the same road between two precincts in the same county, or on the county line in different counties, to unite with the overseer on the other side of such space, and his hands, either in working such intermediate space, or in building the bridges and causeways necessary to bring the two precincts together.

7. To report to the grand jury any apportioner in any election precinct in which his road, or any portion of the same, is situated, who fails to discharge any of his duties.

8. To prosecute all defaulters for not working on roads, as hereinafter provided.

9. To keep the ford of the stream in order, if deemed practicable by the apportioners of the precinct, when any bridge has fallen down or become dangerous.

10. When toll-bridges on public roads are constructed across water-courses, to keep open and in good condition the existing fords at such crossings, and the land entrance thereto on either side of the same.

11. To perform such other duties as are, or may be required of them by law.

McCullough v. State, 63 Ala. 75.

1415 (1650). **Fences not to be joined to bridges without an order.**—No person must join a fence to a bridge on a public road without the authority of an order from the commissioners court,

* Section 1648 of Code of 1876 stricken out by joint committee.

which may be obtained upon petition to such court, showing that the water over which the bridge passes is not necessary to the traveling public, or to the stock of the neighborhood.

1416 (1651) **Apportionment valid until new one made.**—In case no regular apportionment of hands is made, the overseer must act under the last apportionment; and in such case, all persons and hands living within two miles of any portion of the precinct, and not apportioned elsewhere, are liable to work, on being warned by the overseer, as hereinafter provided.

1417 (1652). **When none has been made.**—If no apportionment whatever has been made, or the overseer cannot, on diligent inquiry, ascertain the same, all persons and hands living less than three miles from any portion of his precinct, and not apportioned elsewhere, are liable to work, on being warned, as hereinafter provided.

1418 (1653). **Contract for mile-posts and sign-boards.** The overseers may make contracts for making and painting mile-posts and direction-boards, the account for which, being verified by affidavit and certified by the overseer, must be paid out of the county treasury.

1419 (1654). **Contracts for timber; value of timber; how assessed.**—The overseers may also make contracts with the owners of land for timber to build bridges and causeways, and if they cannot agree, each must appoint a disinterested person; and in case of refusal so to do by such owner, the overseer must appoint two persons, who, after being sworn to act impartially, must value such timber; and if they cannot agree, must call in an umpire, whose decision is final; and the valuation so made, and reduced to writing, on the production of the same, with the certificate of the overseer, must be allowed by the court of county commissioners, and paid out of the county treasury, unless the charges are excessive, in which case such court may allow the reasonable value.

1420 (1655). **Tools other than farming tools; how obtained.**—If any other instruments than ordinary farming tools are necessary to keep the road in repair, the overseer may receive them in exchange for the labor of hands, or he may apply to the court of county commissioners, which court may authorize him to contract for such, and to such an amount as, in its discretion, it thinks proper, and pay for the same out of the county treasury.

1421 (1656). **Who to aid in opening new roads.**—On the opening of new roads, all persons not exempt, living within three miles thereof, are liable to work thereon; and the overseers opening such roads must warn all such persons within that distance, and must proceed against any of them failing to attend and work, as against other defaulters.

1422 (1657). **Mode of warning hands.**—The mode of warning hands is for the overseer, or some other person appointed by him, to give two days' notice, in person or in writing, to be left at the residence, to all persons liable to work, to meet at such time and place as the overseer of the road may appoint, and with such tools as he may direct.

1423 (1658). **Persons giving warning exempt.**—The person serving the notice may be excused from work, at the dis-

cretion of the overseer, for all or any number of days that the hands may work on such warning.

1424 (1659). **If warned on two roads.**—If any person has been warned to work on two roads at the same time, he must work on the one on which he was first warned, if residing within six miles of any portion of such precinct, and not apportioned to any other.

1425 (1660). **Penalty for default.**—If any person warned fails to attend, or send a substitute, with the proper tools, agreeable to the notice, or fails faithfully to perform his duty, such person must pay for each day's default not less than one nor more than three dollars, to be recovered before any justice of the election precinct in which such road is, in the name of the county.

Brown v. State, 63 Ala. 97.

1426 (1661). **The overseer may excuse defaulters; return list of defaulters; no security for costs required.**—The overseer may excuse defaulters, on showing a good excuse on oath, which may be administered by the overseer, within five days after the default; and he must, at the expiration of that time, return on oath a list of defaulters, who are not excused, to any justice of the precinct through which such road, or any portion of the same, passes, who may hear excuses at the trial; and no security for costs in the proceedings for such defaults shall be required.

1427 (1662). **List is evidence of default.**—Such list is presumptive evidence of the default against the person named therein, and should the county fail, the costs must be paid as in state cases.

1428 (1663). **Process.**—The overseers of public roads are authorized and empowered to serve all legitimate process that may be issued from the magistrate's court in the election precinct, against defaulters, to work on such overseer's road; and such overseer shall receive the same fees for such service as are allowed by law to constables for the same; but such overseer must only serve process where there is no constable in the precinct in which such process is issued by the justice of the peace.

1429 (1664). **Proceedings and penalty for failure to prosecute defaulters.**—If any overseer fails to prosecute all defaulters as herein required, any justice of the precinct in which such overseer's road, or any portion of the same, is, must, on application of an apportioner of such precinct, or any person liable to work thereon, issue a summons to such overseer, requiring him, on a day named therein, to show cause why such defaulters were not prosecuted; and if the overseer, on such summons being personally served, fails to show cause, the justice must give judgment against him for as much as the fines against the defaulters would have amounted to, at two dollars a day for each defaulter, not exceeding the amount of fifty dollars, to be paid, when collected, into the county treasury by the officer collecting the same.

1430 (1665). **No property is exempt from execution.**—No property owned by any defaulter in not working a public road is exempt from execution issued on a judgment founded on such default.

1431 (1666). **Road-books.**—The judges of probate must keep road-books, containing a complete list of all the public roads in their counties, their names, grades, and the road precincts, so that an easy reference may at all times be had. *

1432 (1668). **Telegraph wires falling on roads.**—Every telegraph company must, at each and every point where the wire of any line of telegraph may cross any private or public road, erect substantial, durable and permanent posts or piers, to prevent the falling of the wires so as to obstruct or interfere with the travel on such road; and upon failing to erect posts or piers, as herein prescribed, and upon the falling of any telegraph wires so as to obstruct or interfere with the travel along any private or public road, it is the duty of any justice in the county, upon complaint that the wires of any telegraph line have fallen across or along any road, private or public, to issue notice to any officer or agent of such company to be found within the county, to appear before him at such time, not short of ten days' notice, as he may appoint; and upon proof that the wires are down, or have been down for one day, he shall enter a fine of not less than ten nor more than fifty dollars, for every day the wires are permitted to remain down.

1433 (1669). **Notice in absence of officer or agent; fine, how enforced.**—If no officer or agent of the company is found in the county, then, and in that case, notice posted at two or more places near the line of telegraph, in the neighborhood of the place where the wires have fallen, citing the company for five days to appear before a justice of the peace, shall be deemed and held sufficient notice; and if the company shall not defend, by some agent or officer, fine may be entered by default; and if the company shall fail or refuse, for the space of sixty days, to pay any fine imposed under this article, such telegraph line shall be deemed a public nuisance, and upon due notice the same shall be subject to be abated as such, by proceedings before the circuit court of the county in which such wires shall be permitted to continue down, in the same manner as other nuisances are abated.

1434 (1670). **Right of way along public roads for telegraph lines.**—The right of way is granted to any person having the right to construct telegraph lines within this state upon the margin of any public highway.

1435 (1671). **Gates.**—The courts of county commissioners, in their respective counties, may authorize gates to be erected across a public road at such places, and under such conditions and restrictions as will produce the least possible injury to the public.

1436 (1672). **Other roads may be established.**—Other public roads, besides those in this article above provided for, may be established by the courts of county commissioners of the several counties in this state, under the following regulations: Any person desiring the establishment of a public road under the provisions of this section, may file a petition in the court of county commissioners of the county in which the road is proposed to be established, specifying the length, width, points and directions of the desired road, and the names of the owners of the lands over which it is to pass, and setting forth that such road is for

* Section 1667 of Code of 1876 transferred to Criminal Code.

the public benefit. Upon the filing of such petition, the court of county commissioners must set a day for acting thereon, and must cause a written notice thereof to be served upon the owners of the lands over which the desired road is to pass, at least twenty days before the time set for the hearing of such petition. If, upon the hearing of such petition, it shall be made to appear to the court that the road applied for is necessary for the good of the state, the county, or neighborhood in which it is to be established, the court may order it to be laid off and established in the same manner, and under the same regulations as other public roads are required by law to be laid off and established; but no road shall be established, under this section, exceeding twenty feet in width, or in such manner as to run through any person's orchard, garden, or curtilage, without his written consent, filed in such court.

1437 (1673). **Damages.**—The person applying for the establishment of a road under the preceding section shall, when the damages are assessed to the owner of the lands over which it is to pass, in the manner provided by law, and before the road shall be cut out or opened, pay such damage to the owner or person entitled thereto, unless the court shall order such damages to be paid as now provided in other cases; and, in assessing such damages, the jury shall take into consideration the expense of erecting fences along the line of such road, and the annual expense of keeping up such fences.

1438* (1674). **Costs.**—When any road shall be established under the provisions of section 1436 (1672), the person petitioning therefor shall pay all the costs of the proceedings, and all the expenses of putting the road in condition for use, unless the court establishing the road shall order such costs and expenses to be paid out of the county treasury.

1439 (1675). **Who keeps such road in repair.**—The person obtaining the establishment of a road under section 1436 (1672), and such other persons as shall habitually use the road, shall keep the same in repair without being exempt from road duty, unless the court of county commissioners shall otherwise order.

ARTICLE II.

PRIVATE ROADS.

1440 (1676). **Establishment of private roads.**—Private roads may be established by the court of county commissioners, on the application of any person; such roads not to exceed fifteen feet in width, and to be opened and kept in repair by the person on whose application they are established, without exemption on public roads.

1441 (1677). **Proceedings same as in case of public roads; location of road; damages.**—In establishing a private road, the same rules must be observed, and the same proceedings had, as in the case of public roads; but no road must be opened through any person's yard, garden, orchard, stable, lot, ginhouse, or curtilage, without his consent; and the applicant must pay the owner of the land over which such road passes, all damages resulting thereto from the establishment of such road, to be assessed as in case of public roads.

ARTICLE III.

BRIDGES, CAUSEWAYS AND FERRIES.

1442 (1678). **How established.**—The court of county commissioners of each county is invested with authority to establish toll-bridges, free bridges, causeways, and ferries within their respective jurisdictions, as hereinafter provided, and may levy a special tax to build such bridges and causeways, when, in the opinion of such court, the public good requires it.

As amended, Feb. 22, 1883, p. 131.

1443 (1679). **Bridges or causeways on the line of two counties, built at joint expense.**—Whenever a bridge or causeway is necessary on the line between two counties, and the work is too great to be done by the overseers, and not established as hereinafter provided for, the same must be built at the joint expense of such counties, in proportion to the amount of taxable property in each; and a county-line bridge, in the meaning of this section, shall be construed to be a bridge across a stream, or slough, between two counties, whether the actual dividing line between said counties runs on either bank, or in the center of such stream or slough.

1444 (1680). **License for ferries, etc.; bond.**—The court of county commissioners may license any person to establish a ferry, bridge, or causeway, for a term not exceeding ten years, and fix the rates of toll and ferriage, without discriminating in favor of the inhabitants of their county; requiring the applicant to give bond and surety, to be approved by the judge of probate, in not more than two thousand dollars, payable to the county, and conditioned, if a ferry, to keep safe and convenient boats, with a sufficient number of ferrymen, and to keep the banks on each side of the water-course in good repair; if a toll-bridge or causeway, that it shall be well built, of the width prescribed for the grade of the road it is in, and kept in good repair, so that it can be passed at all times with safety and convenience; which bond must be filed in the office of the judge of probate of the county in which the license is granted.

Cox v. Easter, 1 Port. 130; Dyer v. Tuskaloosa B. Co., 2 Port 296; State v. Commissioners, 3 Port. 412; Lewis v. Intendant 7 Ala. 85; Garrett v Ricketts, 9 Ala. 529; Lamar v Commissioners 21 Ala. 772; Milton v. Haden, 32 Ala. 30; Collins v. Ewing, 51 Ala. 101; Borden v. Bradshaw, 68 Ala. 362.

1445 (1681). **Regulation and alteration of tolls.**—The court of county commissioners has authority to regulate and fix the rates of toll on all toll-bridges and ferries in their respective counties, and, from time to time, alter the same, when, in the judgment of the court, the same shall be necessary and proper; but nothing contained in this section shall be so construed as to interfere with the chartered rights of the owners of any toll-bridge or ferry in this state; and no alteration in the tolls of any chartered bridge or ferry shall be made by the court of county commissioners, except upon the application of the owner of such bridge or ferry, or of a majority of the owners thereof.

1446 (1682). **Additional bond.**—The judge of probate must, when directed by the court of county commissioners, or whenever, in his opinion, the public good demands, require an additional bond to be given; and should the same not be given within ten days after such requisition, such failure must be reported to the next term of the court of county commissioners, and the license revoked.

1447 (1683). **Who entitled to license; established only on a public road.**—On application for ferries, where the banks on each side belong to the same person, he is entitled to the prior right of establishing a ferry; when the banks belong to different persons, the court may grant the license, at its election, to either of such owners making the application; but should any person, not the owner of the land on either bank of the river where it is proposed to establish a ferry, make application for a license, he shall be required to produce before the court a statement in writing from the owner thereof, saying that he is not an applicant for such license; but no license for a ferry shall be granted until thirty days' notice of the intended application shall have been given, by notice posted at the court-house door, and at three other public places in the county, two of which shall be in the immediate vicinity where it is proposed to establish such ferry; and if the river is the dividing line between two counties, then the notice shall be posted in both counties; and where the application is made in a county where the owner of the land resides, personal notice shall be given to him. Such license for a ferry shall be granted only at the crossing of a river at a point where a public road has been established.

1448 (1684). **Compensation of the owner of the land.**—The owner of any land appropriated for a public ferry must make application to the first term of the court, after the license is granted, and such court must appoint seven disinterested householders to assess his damages; such householders must be sworn to act impartially, must view the land and assess the damages for its appropriation, and report the same to the judge of probate; if such damages are not paid within thirty days after notice by the owner of such ferry, the court, on application of the owner of the land, must revoke the license.

1449 (1685). **Toll-bridges, etc., between counties may be established by the court of either county.**—Toll-bridges, ferries and causeways on the line between any two counties may be established by the court of either county; and in such case, the bond is to be approved by, and filed in the office of the judge of probate of the county in which the license is granted.

1450 (1686). **Not to be within two miles of another; exception.**—No licensed toll-bridge or ferry must be established on the same water-course within two miles of any other, unless within that distance of some town or city containing not less than five hundred inhabitants.

1451 (1687). **Suit on bond.**—Any person injured by a breach of any bond given under this article may sue thereon in his own name, and recover damages to the extent of the injury; and such bonds are not discharged by a single recovery, but may be sued on from time to time until the whole penalty is exhausted.

Ladd v. Chotard, Minor, 366; Taylor v. Rushing, 2 Stew. 160; Babcock v. Herbert, 3 Ala. 392.

1452 (1688). **Detention at ferry.**—Any person, unreasonably detained at a public ferry, toll-bridge, or causeway, may, for each detention, recover of the owner ten dollars before any justice of the county.

Pate v. Henry, 5 Stew. & Port. 101.

1453 (1689). **Excessive tolls; penalty.**—Any keeper of any

public ferry, toll-bridge, or causeway, who demands or receives from any person a higher rate of toll than is prescribed by the court of county commissioners, forfeits to such person twenty dollars, recoverable before any justice of the county.

1454 (1690). **Injuring bridge or causeway; passing round toll-gate; penalty.**—If any person breaks or injures any gate to a toll-bridge or causeway, or obstructs, injures, or destroys such bridge or causeway, or passes round or under the same, with intent to avoid the payment of toll, such person forfeits to the owner ten dollars for each of such acts, and is also liable to an action for damages.

1455 (1691). **Fords.**—Any person may, however, ford any water-course at any public ferry, without being liable to toll.

1456 (1692). **Damages for injury by defect in bridge; penalty for permitting bridge to remain out of repair.**—When a bridge or causeway has been erected by contract with the county commissioners, with a guaranty, by bond or otherwise, that it shall continue safe for the passage of travelers and other persons for a stipulated time, any person injured, in person or property, before the expiration of such period, by a defect in such bridge or causeway, may sue in his own name on the bond or other guaranty, and recover damages for the injury; and if no guaranty has been taken, or the period has expired, may sue and recover damages of the county.

Barbour v. Brunson, 36 Ala. 362; Barbour v. Horn, 41 Ala. 114; Covington v. Kinney, 45 Ala. 176; Barbour v. Horn, 48 Ala. 566; s. c., Ib. 649; Sims v. Butler, 49 Ala. 110; Schroeder v. Colbert, 66 Ala. 137.

1457 (1693). **Suit brought for failure to repair bridge.** When any bridge has been erected by contract with the county commissioners, with guaranty, by bond or otherwise, to stand for a stipulated period, and is, during such period, washed away, or so damaged as to become unsafe to the public, the court of county commissioners shall, upon the fact being made known to them by any freeholder of the county, notify the contractor to rebuild such bridge, if it be washed away, or repair it, if damaged; and in case of his refusal or neglect to do so in a reasonable time (to be judged of by the court), shall order suit to be brought in the name of the county on such bond.

1458 (1694). **Riparian owners authorized to charge toll.** Riparian owners upon the navigable and other waters of this state, who maintain in good order, for public convenience, erections and ferries upon the banks or shores of such waters, shall be entitled to charge usual and reasonable rates for the use thereof, or such rates as are prescribed in the several acts heretofore passed, authorizing such erections or ferries, or agreed on by such owners with the corporate authorities of any city, or town, or county, in which they are situated; but no erection or structure, or ferry of any kind, shall be permitted injuriously to affect the rights of navigation in such waters.

ARTICLE IV.

WATER-COURSES.

1459 (1723). **Navigable streams.**—All navigable waters in this state are public highways.

Bullock v. Wilson, 2 Port. 436; Mayor, etc v. Eslava, 9 Port. 577; Ellis v. Carey, 30 Ala 725; Glass v. State, Ib. 529; Rhodes v. Otis, 33 Ala. 578; Peters v. N. O., M. & C. R. R. Co., 56 Ala. 528; Dickey v. State, 68 Ala. 508; Lewis v. Coffee County, 77 Ala. 190.

1460 (1724). **Obstructions, how removed.**—The court of county commissioners is authorized to make contracts for opening or clearing out any navigable stream within the county, and for keeping the same free from obstructions.

1461 (1725). **May be divided into road precincts.**—Such court may lay off such navigable stream, or any portion of the same, in the county, as a road precinct, and appoint overseers thereto, as in case of public roads.

1462 (1726). **Hands to work on it as road duty.**—When any water-course is established as a road precinct, hands must be apportioned to, and the same cleared out, obstructions removed, and kept in good order by the overseer, under the same regulations and penalties, as to apportioners, overseers and hands, as are applicable by the provisions of this chapter to public roads.

1463 (1727). **Damages for diverting.**—Any person, diverting any stream from its natural channel, is liable to any party aggrieved for the damages sustained.

1464 (1728). **To prevent the deposit of dead animals in navigable streams.**—Any person, who shall deposit the body of a dead animal in any stream upon which steam or flat-boats ply at any season of the year, is subject to a fine of ten dollars, to be recovered before any magistrate; one-half to the informer, and the other half to the county in which the offense is committed. Justices and constables are specially charged with the enforcement of this section.

CHAPTER 15.

POOR AND APPRENTICES.

ARTICLE 1.—The poor.
2.—Apprentices.

ARTICLE I.

THE POOR.

1465 (1729). **Court of county commissioners purchase and sell lands and other property for poor-houses.**—The court of county commissioners may purchase and hold lands and other property, proper for the erection and continuance of a poor-house, and may, at their discretion, dispose of lands now or hereafter owned for such purpose, and make titles therefor, and may make all appropriations and orders proper for the erection and continuance of poor-houses, and for the regulation and government of the poor and poor-houses.

1466. (1730). **Relatives liable to support poor; how enforced.**—The father, grandfather, brother, mother, grandmother, child, or grandchild of any poor persons, unable to maintain themselves, being of sufficient ability, must support such persons; and failing so to do, any county in the state, having made provisions for such persons, may sue their father, grandfather, brother, mother, grandmother, child, or grandchild, of full age, or either of them, before any court having jurisdiction, and recover, at the rate of eight dollars a month, for the time such county has made provision for such persons; the court or jury, trying the same, being satisfied from the evidence that the defendant was of sufficient ability to provide for their support.

1467 (1731). **Certificate of judge of probate evidence of maintenance.**—On the trial, the certificate of the judge of probate of the county, that the person was poor and unable to maintain himself, and that he was maintained for such a time at the expense of the county, is presumptive evidence of such facts.

1468 (1732). **Costs not to be taxed against county on failure.** Should the county fail to recover, no costs are to be taxed against the plaintiff, except for witnesses attending on behalf of such plaintiff.

1469 (1733). **Pauper lunatics supported by the overseer of the poor.**—If an idiot or insane person has no estate, and no person is willing to become his guardian, the judge of probate must place him in charge of the overseer of the poor, who must provide for his safe keeping and sustenance, and may call on his relations to aid in his support, under the provisions of section 1466 (1730).

1470 (1746). **Captain of vessel bringing paupers to the state, to give bond; penalty for breach; penalty for refusal.** Any person, commanding any vessel which brings into this state any infant, lunatic, maimed, deaf, dumb, aged, or infirm person, who is likely to become chargeable to any county, may be brought before any judge of probate, and if such judge is satisfied that such person will probably be a charge to any county, he must require such master to enter into bond, payable to the state, with sureties resident in the state, to be approved by such judge, in the sum of five hundred dollars for each of such persons so brought, conditioned to pay all such expenses as any county in the state may incur in the support of such person; which bond must be filed and kept by such judge, and, on its condition being broken, may be sued on, and a recovery had in different actions to the amount of the penalty thereof, in the name of the state, for the use of any county; and on failure to give such bond, the judge must commit such master to jail until he gives the same, or is otherwise discharged by law.

1471 (1749). **Sick prisoners in jail.**—Whenever any insolvent person, confined in jail in any county of this state, on any criminal charge, becomes sick and requires medical attention or medicine, the sheriff, or jailer of the county, must give notice to the probate judge of the county of the condition of such person, and the probate judge must, on receiving such notice, or on receiving information in any other manner of the sick and destitute condition of such person, employ a physician, and furnish medicines as may by him be prescribed for such

sick person; and the reasonable expenses of such medical attendance and medicines shall constitute a valid claim against the county.

1472 (1747). **Burial of the poor.**—Upon the decease of any person having no estate, leaving no relative in the county with ability or estate adequate to defray his necessary burial expenses, such expenses are a charge upon the county in which such demise shall take place.

1473 (1748). **Payment of expenses.**—When a death occurs, as contemplated in the preceding section, the court of county commissioners, upon the presentation of the account properly verified, shall make an order requiring the payment of the necessary burial expenses to the party by whom the same were incurred.

ARTICLE II.

APPRENTICES.

1474 (1734). **Children bound out as apprentices.**—The judge of probate of each county may bind out, as apprentices, the children of any person unable to provide for their support, until the age of twenty-one years, if a boy, and eighteen years, if a girl.

Cockran v. State, 46 Ala. 714; Owens v. State, 48 Ala. 328; McKimmey v. McKimmey, 52 Ala. 102; Brinster v Compton, 68 Ala. 299.

1475 (1737). **Officers report minors; and probate judge binds out apprentices.**—Sheriffs, justices of the peace, and all other civil officers of the several counties in this state must report to the probate judges of their respective counties, at any time, all minors under the age of eighteen years within their respective counties, precincts, or districts, who are orphans without visible means of support, or whose parents have not the means, or who refuse to provide for and support such minors; and thereupon such probate judge must apprentice them, and all other such minors as may otherwise come to his knowledge, to some suitable and competent person, on such terms as the court may prescribe, having a particular care to the interest of such minor; and such judge of probate must make a record of all the proceedings in such case, for which he shall be entitled to a compensation of one dollar, to be paid by the master.

Owens v. State, 48 Ala. 328; Brinster v. Compton, 68 Ala. 299.

1476 (1745). **Parent notified.**—The probate judge must notify the minor's father, or his mother, if he have no father, when such father or mother is living in the county, of the proceeding to apprentice such minor; and the father or mother may by proof show his or her ability to support the minor, or that the proposed master is an unsuitable person.

1477 (1744). **Probate judge fixes age.**—When the age of the minor cannot be ascertained by record testimony, the judge of probate shall fix the same.

1478 (1738). **Master appointed on full proof, and gives bond.**—Before an apprentice is bound to any person, there must be full proof of his suitableness to have the charge and care of such minor, and he must give bond, with surety, to be approved and kept by the probate judge, and in such sum as such judge

may direct, and conditioned that he shall furnish such minor with sufficient food and clothing, treat him humanely, furnish him medical attention in case of sickness, teach him, or cause him to be taught, to read and write, if under fifteen years of age, and will conform to any law that may hereafter be passed for the regulation of the duties and relation of master and apprentice.

1479 (1735). **Duties of master.**—The person to whom such apprentice is bound must provide a sufficiency of good and wholesome provisions, furnish all necessary clothing, washing and lodging; treat with kindness and humanity, and instruct such apprentice in the trade, business, or occupation which he pursues; have him taught to read and write; and, at the expiration of his term of apprenticeship, furnish him with two complete new suits of clothing.

1480 (1739). **Master may chastise.**—In the management and control of such apprentice, such master shall have power to inflict such moderate corporeal chastisement as a father or guardian is allowed to inflict on his child or ward at common law; but is no case shall cruel or inhuman punishment be inflicted.

1481 (1740). **Remedy when apprentice leaves.**—If any apprentice leaves the employment of his master without his consent, such master may pursue and arrest such apprentice and bring him before any justice of the peace of the county, who must remand such apprentice to the service of his master; and if such apprentice refuses to return, such justice must commit him to the jail of such county, on failure to give bond, until the next term of the probate court; and such court must, at the first term thereafter, investigate the case, and if, in the opinion of the court, such apprentice left the employment of his master without good cause, must order him to receive such punishment as may be provided by the vagrant laws which may be then in force in this state, until he shall agree to return to his master; but the court may grant continuances, as in other cases; but if the court believes that such apprentice had good cause to quit the employment of his master, the court must discharge such apprentice from such indenture, and may enter a judgment against the master for not more than one hundred dollars, for the use and benefit of such apprentice, to be collected on execution, as in other cases.

1482 (1741). **Release of master and re-apprenticing.**—Any master, if he desires, may summon his apprentice before the probate judge, and, on good and satisfactory cause shown to such judge, and on proof that such apprentice will not be injured thereby, shall be released from all liability as master of such apprentice, and his bond canceled; and such judge must forthwith re-apprentice such minor; and if any master of an apprentice dies before the close of the term of service of such apprentice, the judge must give the preference in re-apprenticing such minor to the widow or other member of such master's family; but such widow or other member of such family must be a suitable person for that purpose.

1483 (1742). **Removal of master to another state.**—When any master of an apprentice, bound to him under the provisions of this article, is about to remove, or has removed to any other state of the United States, by the laws of which such apprentice

may be an inhabitant thereof, the probate court of the proper county may authorize the removal of such apprentice to such state, upon the master entering into a bond with surety, in a penalty to be fixed by the judge, conditioned that such master will, upon such removal, comply with the laws of such state in such cases; but such master shall be cited to attend the court at which such order is proposed to be made, and such apprentice shall have the right to resist the same by next friend, or otherwise.

1484 (1736). **Indentures; when canceled.**—The judge of probate may at any time, for good cause, revoke any letters of apprenticeship, and bind out the apprentice to another.

An appeal does not lie from order revoking letters of apprenticeship.—Cox v. Jones, 40 Ala. 297; McKimmey v. McKimmey, 52 Ala. 102.

1485 (1743). **Parents may apprentice.**—Any parent, having a minor child, may apprentice such minor child, as provided for by this article.

TITLE XIV.

MUNICIPAL CORPORATIONS.

CHAPTER 1.—Incorporation and powers of towns.
2.—Provisions applicable to all cities and towns.

CHAPTER 1.

INCORPORATION AND POWERS OF TOWNS.

1486 (1763). **Mode of proceeding for incorporation of a town.**—The inhabitants of a town not incorporated, the population of which is not less than one hundred, nor more than three thousand, may become a body corporate, upon a petition in writing, addressed to the judge of probate of the county in which they reside, signed by twenty or more of the adult male inhabitants, stating the name and boundaries by which it is proposed to incorporate such town; but the boundaries of such town must not be fixed until a majority of the owners of the real estate situate within such boundaries have, in writing signed by them and filed with the judge of probate, expressed their assent to such boundaries. As amended, Feb. 11, 1881, p. 41.

Ex parte Moore, 62 Ala. 471.

1487 (1764). **Election directed.**—Such judge must direct an election to be held within thirty days after the filing of the petition, at a place in such town by him designated, and under the direction of three inspectors appointed by him.

1488 (1765). **Who may vote.**—All male inhabitants over the age of twenty-one years, who have resided within such boundaries three months next preceding the election, can vote, if not otherwise disqualified.

1489 (1766, 1767). **Oath of inspectors; election.**—The polls must not be opened before ten o'clock in the morning; and the

inspectors, before receiving any ballots, must take an oath to conduct the election fairly. The voters must write upon their ballots "corporation," or "no corporation," and the inspectors must receive and deposit the same in the ballot-box.

As amended, Feb. 11, 1885, p. 42.

1490 (1768). **f majority vote for "corporation," town declared incorporated.**—The inspectors must, within five days thereafter, certify the result to the judge of probate; and, if a majority of the votes cast at the election are for "corporation," he must, within three days, make an entry of record that the inhabitants of such town are incorporated by the name, and with the boundaries designated in the petition; whereupon, the inhabitants of the town are incorporated, and invested with the rights incident to such corporations.

1491 (1769, 1775). **Corporate authorities.**—The business of the corporation is managed by an intendant and five councilors, who are styled the corporate authorities of the town, and hold office for one year, and until their successors are elected and qualified.

As amended, Jan. 26, 1879, p. 74.

1492 (1776). **Who eligible.**—No person can hold the office of intendant, in such corporation, who has not resided within its limits one year next preceding his election; and no person can hold the office of councilor, who has not resided therein six months next preceding his election.

1493 (1770, 1771). **Inspectors for election of corporate authorities; notice.**—The judge of probate must notify the sheriff of the entry of record of such incorporation, and the sheriff must, within ten days, appoint three inspectors, a place of voting in such corporation, and a day not more than fifteen days from such notification, for the election of the intendant and councilors. Notice of the day and place of such election must be by the sheriff posted at two public places in the town at least five days before the election.

1494 (1772, 1773, 1774). **Election.**—The qualification of electors and oath of inspectors must be as in the election for incorporation. If no choice is made, by reason of two or more persons receiving the same number of votes for the same office, the inspectors must decide between such persons by lot.

1495 (1777). **Subsequent elections.**—All elections after the first are to be ordered, and inspectors and voting places appointed by the corporate authorities of the town; and the qualifications of voters must be the same as at the first election. All ties must be determined by lot.

1496 (1778). **Qualifications of officers.**—The qualifications of the intendant are determined by the councilors, and of the councilor by the intendant and the other councilors.

1497 (1779). **On failure of election, officers hold over.** Should the election not take place on the day appointed, the corporation is not for that cause dissolved; but the corporate authorities must appoint some other day, as early as practicable, for holding the election.

1498 (1780). **Quorum of board; removal of officers.**—A majority of the whole number of intendant and councilors constitute a quorum for the transaction of business; but a smaller number may make adjournments, and have power to compel the attendance of absent members by imposing fines. Two-thirds

of the whole number of the corporate authorities may remove any officer or member for malconduct or disorderly behavior.

1499 (1781). **Increase of councilors.**—Whenever, in the opinion of such corporate authorities, it is expedient to increase the number of councilors to nine, they may direct nine to be elected at the next and every succeeding annual election, and may, in like manner, reduce the number to five again.

1500 (1782). **Powers of the corporate authorities.**—The corporate authorities of the town have the following powers:

1. To pass such by-laws and ordinances as may be necessary to enforce the powers in this title to them granted, and for their own government, not contrary to law.

2. To prevent and remove nuisances at the expense of the person causing the same, or upon whose property the same may be found.

3. To license, tax, regulate and restrain theatrical and other shows and amusements, and the retailing of spirituous, vinous and malt liquors within the corporate limits.

4. To restrain and prohibit gaming, houses of ill-fame, disorderly conduct and breaches of the peace.

5. To establish night and day watches and patrols, and to appoint captains thereof.

6. To establish and regulate markets and town prisons; sink and repair public wells, and make all needful provisions for furnishing the town with water; and keep in repair all necessary streets, alleys and drains.

McCain v. State, 62 Ala. 138.

7. To license and regulate wagons, carts, drays, hacks and carriages running in such town for hire.

8. To appoint a marshal, treasurer, clerk, and all the necessary officers, prescribe their duties, and fix their compensation, and fix the compensation of the intendant.

9. To impose fines, not exceeding fifty dollars, for breaches of their by-laws or ordinances, and to collect the same by execution against the property of the offender; and any person failing to pay such fine may be sentenced to hard labor on the streets of the town for a period not exceeding thirty days; to punish disorderly conduct or a breach of the peace by imprisonment for a period not exceeding thirty days.

Ex parte Moore, 62 Ala. 471.

10. To supply all vacancies in their own body, and the persons so appointed shall hold until their successors are elected at the next election and qualified.

11. To purchase, hold and dispose of real property and such personal property as may be necessary for the use of the corporation.

12. To exercise such other powers as are conferred on them by law.

1501 (1783). **Intendant acts as justice.**—The intendant has the powers and jurisdiction of a justice of the peace in all matters, civil or criminal, arising within the corporate limits.

1502 (1784). **Authority of marshal.**—The marshal has authority, within the corporate limits, to execute the lawful ordinances of such corporate authorities, and must, without

warrant, arrest all persons breaking the peace, or violating any ordinance, and bring the offenders before the intendant.

1503 (1785). **Ordinances not enforced until published.**—No by-law or ordinance of the town must be enforced until it has been published at least ten days in three public places in the town, and also in a newspaper, if any is published within the corporate limits.

1504 (1786). **Powers of taxation.**—On all real property situate within the boundaries of such town, and on all personal property of the inhabitants thereof, the corporate authorities may levy annually a tax, not exceeding one-half of one per cent., on the value thereof, as assessed for state taxation during the preceding year; a poll-tax of not exceeding two dollars on each adult male inhabitant who has resided therein three months next preceding such levy; on each vehicle used for the transportation for hire of persons or property within the corporate limits, a license-tax not exceeding thirty dollars; on each retailer of spirituous, vinous, or malt liquors, a license-tax not less than twenty nor more than five hundred dollars; on each dealer in drugs or medicines, goods, wares, or merchandise, a license-tax not exceeding twenty-five dollars; on each auctioneer, a license-tax not exceeding fifty dollars; on each pack of playing cards sold or exchanged, a tax not exceeding one dollar.

1505 (1787). **Assessment annual.**—The corporate authorities may cause an assessment of all property subject to taxation to be made annually, the assessment naming the owner of the property, when known; if not known, assessing it to owner unknown.

1506 (1788). **Notice of meeting to correct errors in assessment.**—The assessment must be returned to the intendant, who must cause ten days' notice of the time and place when the corporate authorities will correct mistakes in such assessment, to be given by advertisement in a newspaper, if any is published in such town, and, if not, the notice must be posted at some public place therein, at least ten days before the time for such correction.

1507 (1789). **Errors corrected; assessment approved.**—The corporate authorities must attend at such time and place and correct all mistakes in the assessment, and, when corrected, mark upon the same, "approved," and deliver it to the person appointed to collect the taxes.

1508 (1790). **Assessment has force of judgment.**—The assessment, when so approved, has the force and effect of a judgment and execution, and the person appointed to collect the taxes may, on a failure to pay, collect the same by levy and sale of the property of the person so failing, or, if the assessment be to owner unknown, by a sale of the property.

1509 (1791, 1792). **Notice of sale.**—Of all sales of personal property under the preceding section, ten days' notice of the time and place must be posted at a public place in the town; and of all sales of real property for the non-payment of taxes, thirty days' notice must be given by advertisement in a newspaper published in the town, or, if there be none, the notice must be posted at some public place therein for thirty days before the sale.

1510 (1793). **Contents of notice.**—Such notice must state,—

1. The description of the property.

2. The name of the person to whom assessed, unless assessed to owner unknown, in which case it must be so stated.

3. The amount of taxes assessed and the costs, including expenses of the notice.

1511 (1794). **Hours of sale.**—All sales of property for the non-payment of taxes under this chapter must commence between the hours of ten and twelve in the morning, and not continue past the hour of four in the afternoon, and may continue from day to day until completed.

1512 (1795). **Certificate of purchase of real estate.**—The collector or person making the sale must give to the purchaser of real estate a certificate of purchase, stating the authority under which the sale was made, the time and place of sale, the notice thereof which was given, the amount of the taxes and costs for the payment of which the sale was made, the name of the owner to whom such taxes were assessed, if known, and if unknown, the fact that he is unknown, a description of the property, the name of the purchaser, the amount bid, and the payment of the bid.

1513 (1796). **Redemption.**—Real estate so sold for taxes may be redeemed at any time within two years from the sale, on payment of the amount for which the property sold, with interest at the rate of ten per cent. per annum, and all taxes which have accrued subsequently; and if the purchaser does not reside within the corporate limits, payment may be made into the corporation treasury for him.

1514 (1797). **By persons under disability.**—Infants, married women and persons of unsound mind may redeem their real property so sold on the same terms, on application to the court of chancery within one year after the removal of their respective disabilities.

1515 (1798). **Inhabitants exempt from road duty.**—The inhabitants of such town are exempt from working on roads without the corporate limits.

1516 (1799). **Change of name or boundary.**—Ten adult male inhabitants may, by petition in writing to the judge of probate, propose an alteration or change of the name, or of the boundaries of the town, stating the alteration or change proposed; and on the filing of such petition, the judge of probate must order an election to be held and conducted in all respects as the election for the original incorporation; and if at such election a majority vote for the proposed alteration or change, the fact must be certified to such judge by the inspectors, and on the filing of such certificate he must make and enter an order allowing such alteration or change; but the boundaries of the town cannot be extended until the consent in writing, signed by them, of at least two-thirds of the owners of the real estate situate within the extension has been filed in the office of the judge of probate.

CHAPTER 2.

PROVISIONS APPLICABLE TO ALL CITIES AND TOWNS.

1517 (1800). **Punishment of female.**—For a violation of an ordinance or by-law of a town or city, a female must not be punished by subjecting her to work on the streets.

Feb. 13, 1879, p. 192.

1518. Appeals from judgments of conviction for a violation of municipal ordinances or by-laws.—If not otherwise provided by the charter of a town or city, an appeal to the circuit court of the county will lie from a judgment of conviction for a violation of an ordinance or by-law of the town or city; such appeal to be taken within five days after the rendition of such judgment, and to be governed in all respects by the laws regulating appeals from judgments of justices of the peace in criminal cases.

1519 (1801). **May regulate running of trains; may prohibit the standing thereof on or across streets.**—Towns or cities have power to regulate the running of railroad trains or engines within the corporate boundaries, limiting the moving or running thereof to a speed of not more than four miles per hour; and to prohibit the standing thereof on or across the streets or highways within the corporate boundaries.

Jan. 31, 1879, p. 16, sec. 6.

1520. Municipal special tax kept separate.—Unless otherwise provided by its charter, when a special tax is levied by a town or city for any purpose, the levy, collection and disbursement thereof shall be separate in all respects from the levy, collection and disbursement of general municipal taxes; and all moneys, books, receipts, vouchers and warrants relating thereto shall be kept separate, and express on their face that they relate to the special tax, and state the object of the tax; but the same officers may act in the levy, assessment, collection and disbursement of the general and special taxes, unless otherwise provided. If, after the purpose of the special tax is accomplished, there remains a balance over, it shall be transferred to the general fund of the corporation.*

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* See note to section 628, on page 191.

PART SECOND.

PRIVATE CORPORATIONS; REAL AND PERSONAL PROPERTY; ITS ACQUISITION, ENJOYMENT AND DISPOSITION, AND OTHER PRIVATE RIGHTS.

TITLE I.

PRIVATE CORPORATIONS.*

CHAPTER 1.—Banks and banking.
2.—Insurance companies; life, accident, fire, marine.
3.—Mutual aid associations.
4.—Building and loan associations.
5.—Mining, quarrying and manufacturing companies.
6.—Railroad companies.
7.—Street railway companies.
8.—Macadamized, turnpike and other toll-road companies.
9.—Telegraph companies.
10.—Navigation companies.
11.—Corporations not specially provided for.
12.—General provisions.
13.—Dissolution.
14.—Corporations not of a business character.

CHAPTER 1.

BANKS AND BANKING.†

1521. Banks of deposit and discount.—Corporations for the purpose of carrying on the business of banking, without the issue of bills or notes for circulation, may be formed upon the terms and conditions, and with the capacity and powers in this chapter expressed.

1522. Number of corporators; amount of capital.—No such corporation must be formed without at least three stockholders, or without a capital subscribed in good faith of at least

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* The title on private corporations was rewritten and re-arranged by the Code commissioners; and references to sections of the Code of 1876, and subsequent enactments were not, in the majority of instances, made; such references, by reason of the re-arrangement, being, in some instances, impracticable, and in others misleading.

† This chapter is based on the act of December 8, 1880, p. 123.

fifty thousand dollars, of which not less than twenty per cent., and, in no case, less than twenty-five thousand dollars, must be actually paid by the subscribers for stock before the filing of the declaration hereinafter mentioned.

1523. Declaration filed in office of judge of probate.—The subscribers for stock, desiring to form such corporation, must file in the office of the judge of probate of the county in which it is proposed the corporation shall be located, and have its principal place of business, a declaration in writing, signed by each of them, stating their names and residences; the name and style of the proposed corporation; the location and principal place of business thereof; the amount of the capital stock, and the number of shares into which it is divided; the purposes and nature of the business of the proposed corporation, with any other matters which they may deem it desirable to state; such declaration must be accompanied by the affidavit of the subscribers, verified before the judge of probate, that twenty-five thousand dollars of the capital has been actually paid by the subscribers, and that the same is in fact held, and is to be used solely for the business and purposes of the corporation.

1524. Certified copy of declaration and affidavit to be filed in office of secretary of state.—The declaration and affidavit having been filed and recorded in the office of the judge of probate, on the request of any one or more of the subscribers, the judge of probate must make and certify, under the seal of his office, a full and complete transcript thereof, which must be filed in the office of the secretary of state; and upon the filing and record thereof in his office, the secretary must issue to the subscribers, their associates and successors, a certificate of incorporation, under the seal of the state, certifying that the transcript of the declaration and affidavit, certified by the judge of probate, is of file and record in his office, and that the subscribers, their associates and successors are a body politic and corporate, under the name and style designated in the declaration, such corporation being located, and having its principal place of business at the place designated in the declaration, and that such corporation has the capacity and powers conferred, and is subject to the duties and liabilities imposed by law; and must record such certificate; and thereafter such corporation must be deemed fully organized.

1525. Powers of corporation.—Such corporation, when organized, has power,—

1. To have succession by its corporate name, for the period of twenty years.

2. To sue and be sued.

3. To use a common seal, if deemed necessary, and at pleasure to alter the same.

4. To appoint such officers and agents as the business of the corporation requires, removing them at pleasure, prescribe their duties, and fix their compensation.

5. To make such by-laws as may be necessary for the management of its property, the regulation of its affairs, the creation and preservation of a lien on the shares of any stockholder for any indebtedness or liability he may incur to the

corporation, and such regulations as are deemed proper for the transfer of its stock.

6. To hold, purchase, dispose of, and convey such real and personal property as may be necessary for its uses and business.

7. To discount bills, notes, or other evidences of debt; to receive and pay out deposits, with or without interest; to receive on special deposit money, or bullion, or foreign coins, or stocks, or bonds, or other securities; to buy or sell foreign or domestic exchange, gold and silver bullion, or foreign coins, bonds, stocks, bills of exchange, or other negotiable paper; to lend money upon personal security, or upon pledges of bonds, stocks, or negotiable securities; to take and receive security by mortgage, or otherwise, on property, real or personal.

8. To increase or decrease the capital stock in the manner hereinafter provided; but such corporation shall not have power or capacity to issue bills or notes in any form for circulation as money.

1526. Board of directors.—The business of the corporation is under the management and control of a board of directors, members of the corporation, holding and owning shares of the capital stock in good faith, who must exercise such powers as are delegated to them by the stockholders, or by the by-laws of the adoption of the stockholders; and the board must not consist of less than three members, to be elected by the stockholders at such time and place, and for such term, as may be appointed by the by-laws.

1527. Capital stock may be increased or decreased.—The capital stock of the corporation may be increased to a sum not exceeding five hundred thousand dollars, or may be decreased to a sum not less than fifty thousand dollars, at a meeting of the stockholders called for the special purpose, of which notice for thirty days must be given each stockholder personally, if his residence be known, and by publication for four consecutive weeks in some newspaper published at the location or principal place of business of the corporation; and such increase or decrease must not be made except upon the vote of the stockholders holding the larger amount in value of the capital stock. If at such meeting the stockholders holding the larger amount in value of the capital stock vote for such increase or decrease, the proceedings of the meeting must be reduced to writing, and entered on the books or minutes of the corporation; and a copy thereof, verified by the certificate of the president or cashier, must be filed and recorded in the office of the judge of probate of the county in which the declaration is of file and record; and a copy thereof, duly certified by such judge, must be filed and recorded in the office of the secretary of state.

1528. Existing banks or loan associations may re-organize under this article.—Any banking corporation or loan association, which has been or may be organized under any law of this state, may be re-organized and do business under the provisions of this chapter, upon complying with the conditions following:

1. The majority in value of the holders of the shares of such corporation shall express their wish so to do by a written paper signed by them, or expressed by vote or resolution at an election

or meeting of the stockholders, to be held upon ten days' notice thereof, by publication in some newspaper published in the county wherein its business is carried on.

2. Thereupon, the president and directors shall file in the office of the judge of probate of the county wherein the new corporation proposes to carry on its business, the original of such paper, or copy of such resolution, and a certificate signed by them, wherein shall be stated the name to be assumed by the corporation, the city, town, or village, and county wherein its business is to be carried on, the amount of its capital stock, the number of shares into which it is divided, the par value thereof, and their market value according to the last preceding sale which may have been made thereof, the cash value of its assets and securities, and the nature thereof, and the amount and description of its debts and liabilities; which certificate shall be verified by the oath of the president and cashier or secretary of said corporation. If it appear to the judge of probate that such corporation is solvent, that its capital is not of less value than par, and, in the aggregate, of not less value than fifty thousand dollars, the judge shall cause record to be made of the papers and documents so produced, and certify a copy thereof to the secretary of state, who shall cause the same to be recorded in his office, and issue a certificate of incorporation, as is provided in section 1524; and from and after the issue of such certificate, the former corporation must be deemed dissolved, and the corporation, as re-organized, must be deemed a corporation, having the powers and capacity in this chapter expressed; but such dissolution and re-organization must not be deemed to affect the pre-existing liabilities of such corporation.*

1529. Certificates of deposit not to be re-issued.—No certificate of deposit, issued by the corporation for any special deposit for which interest is to be paid, must be re-issued, but, on the return thereof, must be canceled.

1530. Deposits by married women or minors.—A married woman or minor may make, in her or his own name, a deposit of her or his earnings or savings in any bank; and such deposit may be general or special, and shall be paid only to such married woman or minor, or upon her or his order, and not to the husband of such married woman, or to the parents or guardian of such minor.

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* By act approved February 28, 1887 (Pamph. Acts 1886–7, p. 98), amending section 6 of the act of December 8, 1880, it is enacted: "That any banking corporation or loan association which has been organized under the laws of this state, whose original capital stock is less than $50,000, may be re-organized and do business under the provisions of this act, to increase its stock to not less than $50,000, and by complying with the provisions of this section; and the court of probate shall properly record and certify, as required by this section, notwithstanding the original capital stock was less than $50,000.00. And any such banking corporation, whose capital stock originally was less than $50,000, that has increased the same to said amount, and has re-organized, or may hereafter do so by a substantial compliance with this act, shall be deemed and taken to be a corporation, chartered under this act, and may continue business as if originally organized and chartered by virtue hereof; *Provided, however*, That the judge of probate shall have all the power conferred on the court of probate by this act, or any section thereof, and all acts performed by him heretofore, in such re-organization under this act, shall be deemed and held valid."

CHAPTER 2.

INSURANCE COMPANIES; LIFE, ACCIDENT, FIRE, MARINE.

1531. Corporations for insurance.—Corporations for the insurance of lives, or for the insurance of persons or property against accident, or for insurance against fire, or against the perils and risks of the sea or of navigable streams, may be formed upon the terms and conditions, and with the powers and capacity in this chapter expressed.

1532. Number of stockholders; amount of capital stock. No such corporation must be formed without at least three stockholders, or without a capital stock, subscribed in good faith, of at least fifty thousand dollars, of which not less than twenty per cent., and in no case less than twenty-five thousand dollars, must be actually paid in by the subscribers before the filing of the declaration mentioned in the next succeeding section.*

1533. Declaration filed in office of judge of probate.—The subscribers to the capital stock, proposing to form such corporation, must file in the office of the judge of probate of the county in which the proposed corporation is to be located, and have its principal place of business, a declaration in writing, signed by each of them, stating their names and residences, the name and style of the proposed corporation, the proposed location or principal place of business thereof, the purposes of the corporation, and the nature of its business, the amount of the capital stock, and the number of shares into which it is divided, and any other matters they may deem it desirable to state, accompanied by an affidavit, verified before the judge of probate, that at least twenty-five thousand dollars of the capital stock has been actually paid by the subscribers, and is in good faith held and to be used solely for the purposes, and in the business of the corporation; which declaration and affidavit must be recorded by the judge of probate.

Grangers' L. & H. Ins. Co. v. Kemper, 73 Ala. 525.

1534. Certified transcript filed in the office of secretary of state.—The judge of probate, on the request of any one or more of the subscribers, must make and certify, under the seal of his office, a full and complete transcript of the record of such declaration and affidavit, which must be filed and recorded in the office of the secretary of state; and upon the filing and record thereof, the secretary must issue to the subscribers, their associates and successors, a certificate of incorporation, under the seal of the state, certifying therein that they are a body politic

* By act approved February 28, 1887 (Pamph. Acts 1886–7, p. 85), it is enacted: (1) "That all insurance companies doing business, as such, in the State of Alabama, whether chartered by the state, or admitted from other states, shall have an actual capital, fully paid up in cash, of not less than one hundred thousand dollars, no portion of which shall be represented by stock notes, or loans on the stock of said company or companies as collateral." (2) "That all insurance companies doing business in this state, both foreign and domestic, shall be required to make annual sworn statements to the auditor of their assets, condition, business of the previous year, in premiums, losses and expenses, in the state, and as a whole." (3) "That all laws and parts of laws in conflict with this provision, be, and the same are hereby repealed."

and corporate, under the name and style designated in the declaration, having the location or principal place of business in the declaration designated, with the powers and capacity conferred, and subject to the duties and liabilities imposed by law; and must record such certificate; and thereafter such corporation must be deemed duly organized.

1535. Powers of corporation.—Such corporation, when organized, and any such company heretofore organized, has the power,—

1. To have succession by its corporate name for a period not exceeding twenty years.

2. To sue and be sued; and if deemed necessary, to have a common seal, and to alter the same at pleasure.

3. To hold, purchase, dispose of, and convey such real and personal property as may be necessary for its uses and purposes.

4. To appoint such officers and agents as the business of the corporation may require, prescribe their duties, fix their compensation, and remove them at pleasure.

5. To make such by-laws for the management of the property, the regulation of the affairs, the transfer of the stock of the corporation, and the creation and preservation of a lien on the shares of stockholders for any indebtedness contracted with, or liability incurred to it, as may be deemed necessary.

6. To carry on the business of life insurance, or of accident insurance, or of life insurance and insurance against accidents to the person combined, or of fire insurance, or of marine insurance, or of fire and marine insurance combined, or of either, and insurance against accidents to property, as may be expressed in the declaration.

7. To invest their money in real or personal property, stocks or choses in action, and to sell the same; to lend money, discount bills, and secure the payment thereof; to buy and sell exchange, and receive and pay out deposits.

1536 (1625). **Renewal of incorporation.**—An incorporation under this article may be renewed according to the provisions hereinbefore made, with the consent of a majority in value of the stockholders, expressed at a meeting of the stockholders called for that purpose.

1537 (1626). **Increase or decrease of capital stock.**—The capital stock of such corporation may be increased to a sum not exceeding five hundred thousand dollars, or decreased to a sum not less than fifty thousand dollars, by a vote of the persons holding the larger amount in value of the stock, at a meeting of the stockholders called for that purpose, of which thirty days' notice must be given each stockholder personally, whose residence is known, and by publication for four consecutive weeks in some newspaper published in the county; if at such meeting the persons holding the larger amount in value of the stock vote for the proposed increase or decrease, the proceedings of the meeting must be reduced to writing and entered on the books or minutes of the corporation, and a copy thereof, verified by the certificate of the president or secretary, must be filed and recorded in the office of the judge of probate in which the declaration is of file and record; and the judge must make and

certify, under his seal of office, a transcript thereof to the secretary of state, who must file and record the same in his office.

Grangers' L. & H. Ins. Co. v. Kemper, 73 Ala. 325.

1538. Corporations may adopt or abandon mutual plan of transacting business.—Any corporation, now organized for carrying on the business of insurance in any of its forms, or which may be hereafter organized under this chapter, may adopt the mutual plan or principle of allowing policy-holders, or parties insured to participate in the profits, or, having adopted such plan or principle, may abandon it, by the consent of a majority in value of the holders of the capital stock, at a meeting called for that purpose, of which thirty days' notice must be given personally to each stockholder, whose residence is known, and by publication for four consecutive weeks in some newspaper published at the location or principal place of business of the corporation; if, at such meeting, a majority in value of the holders of the capital stock vote for the adoption, or abandonment of the mutual plan or principle, they may also vote such change in the name of the corporation as they may deem desirable. The proceedings of such meeting must be reduced to writing and entered on the books or minutes of the corporation, and a copy therof, verified by the certificate of the president or secretary, must be filed and recorded in the office of the judge of probate in which the declaration is of file and record; and the judge must certify a transcript of the record to the secretary of state, who must file and record the same in his office; and thereafter the corporation may conduct its business according to such vote, and by the name adopted.

1539. Stockholders' or directors' meetings may be held without the state.—By the consent in writing of all the holders of the capital stock residing in this state, obtained before each such meeting, and filed and recorded in the office of the judge of probate in which the declaration is of file and record, or of the county in which the corporation has its principal place of business, a copy whereof, certified by such judge under the seal of his office, must be filed and recorded in the office of the secretary of state, a corporation organized under this chapter, or any insurance corporation heretofore organized under the laws of this state, may hold meetings of the stockholders, or of the directors, at such place without the state as may be designated by the by-laws of the corporation, of the adoption of the stockholders; but such corporation must keep an agent in this state, residing at its location or principal place of business, with whom must be deposited copies of the proceedings of such meetings; and must file in the office of the judge of probate of the county in which the consent of the stockholders residing in this state is of file and record, and in the office of the secretary of state, a certificate of the president, stating the name of such agent, and a like certificate as there may, for any cause, be a change of such agent; and copies of such proceedings of such meetings, certified by such agent, or the copies thereof filed with him, are admissible in evidence in all legal proceedings against such corporation; and service of process upon such agent, in any suit or proceeding against such corporation, must be deemed and taken as service on the corporation.

1540. Principal place of business within this state required.—All corporations organized under the provisions of this chapter must have and keep an agent at the principal place of business designated in the declaration, on whom process may be served for the corporation in any and all proceedings against it.

1541 (2012). **Consolidation of insurance corporations.**—Any two or more insurance corporations, incorporated under the laws of this state, may unite and consolidate their capital stock, property and business in the manner hereinafter provided.

1542 (2013). **How proposal adopted; entry on minutes.** Such consolidation shall be made on the recommendation of the board of directors of each of the corporations proposed to be consolidated, when adopted by a vote of the persons holding the larger amount in value of the capital stock of each corporation. Such recommendation shall be submitted in writing by the board of directors to the meeting of stockholders, and, with the vote of the stockholders thereon, shall be entered on the minutes.

1543. How consolidation consummated.—When a proposal for consolidation has been thus adopted, the consolidation shall be carried out by an agreement in writing, sealed with the corporate seals, and signed by the presidents of the contracting corporations, reciting that such agreement is made with the consent of the stockholders of each of the corporations, given as provided above, and stating the terms and conditions of such consolidation. This agreement must be recorded in the office of the judge of probate of the county in which such corporations are located; or, if they be located in different counties, in the office of the judge of probate of each county, and a certified copy filed with the secretary of state; upon the filing of such certified copy in the office of the secretary of state, and his certificate thereof, the consolidation is complete.

1544 (2015). **Name and charter of new corporation, and changes in stock, etc.**—On such consolidation, the parties may, by their agreement of consolidation, adopt the name and charter of either corporation as the name and charter of the consolidated corporation, and may make such changes and provisions, as to the amount of stock and the number of directors of the consolidated corporation, as they may think proper.

1545 (2016, 2017). **Property, rights and liabilities of new corporation; pending suits.**—The corporation, so formed by consolidation, shall be entitled to all the property and rights of each of the corporations so uniting, and liable to the debts and obligations of each of them. Suits pending for or against either of such original corporations at the time of consolidation are not abated, and shall not be delayed thereby, but shall proceed in the name of the consolidated corporation.

1546 (2018). **Dissimilar corporations cannot consolidate.** Nothing in the five preceding sections shall be construed to authorize the consolidation of insurance corporations of dissimilar character.

CHAPTER 3.

MUTUAL AID ASSOCIATIONS.

1547. What are mutual aid associations.—All associations, whether voluntary or incorporated under the laws of this or any other state, doing in this state a business limited to the issuing of certificates to, or agreeing with their members, upon the birth of any child, upon marriage, decease, sickness, or upon any physical disability of such member, to pay money or render aid to him, or to others dependent on him, or beneficiary designated by him, which money or aid is derived from donations, or from fees, dues and assessments, are subject to the provisions of this chapter only. Feb. 23, 1883, p. 168, sec. 1.

1548. Report to auditor.—Every such association shall, on or before the first day of March of each year, file with the auditor a report of their operations during the year ending the thirty-first day of December next preceding, including a statement of the number of existing members, the number who have become members during such year, the number whose membership has terminated and the cause thereof, the total receipts and the sources thereof, and the total expenditures and the objects thereof. This report shall be upon blank forms provided by the auditor, and shall be verified by the affidavit of an officer of the association. These reports, or their substance, shall be published in the auditor's annual report, and the auditor shall receive from each such association, at the time its report is filed, a sum equal to one dollar for each one hundred members, or fraction thereof, not exceeding twenty-five dollars from any one association. No other charge shall be made by the auditor upon such association, and no deposit of securities with him shall be required. Any association, refusing or neglecting to make such report and payment, may, upon the suit of any citizen, be enjoined by a court having jurisdiction from carrying on business until such report and payment, and until the costs of suit are paid. Ib. sec. 2.

1549. Principal office and service of process; auditor's license.—Every such association, before commencing business in this state, shall, by an instrument under the hands of its president and secretary, filed in the auditor's office, designate some place as the principal office of such association in this state, and some person residing at that place as the person upon whom service of legal process and papers may be made as upon such association. If the person so designated removes from such place, or dies, another shall be appointed in his stead within thirty days. Notice of any change of office or agent shall be filed with the auditor within thirty days thereafter. Upon failure to comply with any of the provisions of this section, the association shall cease to do business in this state until compliance. No such association shall commence to do business in this state until it has received from the auditor a license, a duplicate whereof shall remain on file in the auditor's office. Ib. secs. 3, 4.

1550. Visitation.—Every such association shall be subject to visitation, and its books and papers to inspection by the auditor, or such person as he may designate. If the auditor is, at any Ib. sec. 5.

time, of the opinion that such association should be restrained from doing business, he shall report such opinion, with the facts upon which it is based, to the attorney-general, whose duty it is, if he thinks the facts warrant the report, to apply to the judge of the circuit in which is the principal place of business of the association for an order requiring the officers of the association to show cause, at a reasonable time and place within the circuit, why the association should not be restrained from continuing business. The association shall be entitled to a trial by jury of the facts stated in the report.

Ib. sec. 6. **1551. Life insurance companies, Masons and like orders not affected.**—Nothing in the four preceding sections shall be construed to apply to any corporation, incorporated under the life insurance laws of this or any other state or country, or to any secret or benevolent society, such as Masons, Odd Fellows, Knights of Pythias, or like orders.

1552. Exemptions.—The interest of resident members of such associations therein, and of resident beneficiaries provided for thereby, is exempt from all process for the collection of debts, or the enforcement of liabilities.

CHAPTER 4.

BUILDING AND LOAN ASSOCIATIONS.

1553. May be incorporated.—Three or more persons, associating as a building and loan association, may become a body politic and corporate in the mode, and with the powers and capacity in this chapter expressed; and such corporation may continue for twenty years.

1554. Mode of incorporation.—Such persons must file in the office of the judge of probate of the county in which it is proposed the association shall have its principal place of business, a declaration in writing, signed by each of them, stating,—

1. The name and style under which it is proposed to incorporate such association.
2. The amount of the capital stock, and the number of shares into which it is divided.
3. The names and residences of the associates or subscribers to the declaration, and the principal place of business of the corporation.
4. The purposes of the corporation and the nature of its business, and such other matters as they may deem desirable.

1555. Record of declaration; certificate of incorporation. The judge of probate must record such declaration, and must issue to the subscribers, their associates and successors a certificate of incorporation, under the seal of his office, stating therein the filing and record of such declaration, the name and style of such corporation, the location or principal place of business thereof, and that the subscribers, their associates and successors are a body politic and corporate; and thereafter such corporation must be deemed duly organized.

1556 (1943, 2019). **Powers of such corporation.**—Such corporation has power,—

1. To have succession by its corporate name for the period expressed in the declaration, not exceeding twenty years.

2. To sue and be sued; and, if deemed necessary, to have a common seal, and the same at pleasure to alter or change.

3. To hold, purchase, dispose of, and convey such real or personal property as may be necessary for the uses and business of the corporation.

4. To appoint and remove, at pleasure, such officers and agents as the business of the corporation may require, prescribing their duties and fixing their compensation; and to make all needful rules and regulations and by-laws for the transaction of its business, and the management and control of its affairs.

5. To levy monthly contributions from the shareholders, not to exceed one dollar per share in any one month.

6. To compel payment, and compliance with all lawful orders by fines and forfeitures.

7. To acquire real estate, to erect buildings, and the same to let to any shareholder of the corporation, or to sell to such shareholder on such terms as may be fixed by its by-laws.

8. To aid shareholders in the erection or improvement of houses by loans of the funds of the association, on such security as may be fixed by the by-laws.

9. When funds are on hand, to lend the same to any shareholder of the corporation, on such security, and on such terms and conditions as may be prescribed by the by-laws; but the security shall be a mortgage on real estate sufficient to protect the association.

10. When deemed advisable, or when two or more shareholders desire to borrow funds on hand, the association may lend such funds to the highest bidder; and all shareholders shall have equal opportunities to bid under such regulations as may be prescribed by the by-laws; but no shareholder shall borrow or purchase the loan of more than two hundred dollars for each share held by him.

11. To prescribe uniform sales of monthly installments, in which the loans made are to be repaid according to the terms agreed on; and if loaned to the highest bidder, according to the terms of the purchase.

12. To secure the payment of installments and loans, and a compliance with all the terms on which loans are purchased, by mortgages with power of sale on real estate, and the same to foreclose, in case of default, by a public sale to the highest bidder, and by conveyance to the purchaser; and such purchaser need not be a shareholder.

13. In determining the amount of the capital stock of the association, each share shall be valued at fifty dollars.

Cahall v. Citizens' M. B. A., 61 Ala. 232; Kelly v. M. B. & L. A., 64 Ala. 501; Mobile B. & L. A. v. Robertson, 65 Ala. 382; Security L. A. v. Lake, 69 Ala. 456; s. c. 72 Ala. 307; Montgomery M. B. & L. A. v. Robinson, 69 Ala. 413.

CHAPTER 5.

MINING, QUARRYING AND MANUFACTURING CORPORATIONS.

1557. Corporations formed.—Two or more persons, associating for the purpose of mining, quarrying, or manufacturing, may form themselves into a corporation, in the mode, and having the capacity and powers in this chapter expressed.

1558. Declaration filed in court of probate; contents.—The persons so associating must file in the office of the judge of the court of probate of the county in which it is proposed such corporation shall have its principal place of business, a declaration in writing, signed by each of them, stating the names and residences of the subscribers, the name and style of the proposed corporation, the amount of its capital stock, and the number of shares into which it is divided, the general purposes of the corporation, and the nature of the business proposed, and the proposed principal place of business of the corporation, with such other matters as they may deem it desirable to state.

1559. Commission issued by judge of probate.—On the filing of the declaration, the judge of probate must issue to two or more of the subscribers, a commission authorizing them, as commissioners, to open books of subscription to the capital stock of the proposed corporation, at such time and place, and upon such notice as they may appoint.

1560. Subscriptions for stock.—All subscriptions to or for the capital stock must be payable in money; but the commissioners may receive subscriptions payable in money, the subscriber having the privilege of discharging the same by the rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at the reasonable value of such services or labor; or in property, at the reasonable value thereof, the corporation has capacity to acquire and hold; the subscription stating the nature and character of such property, and when it is to be transferred or conveyed to the corporation.

1561. Organization of corporation.—Fifty per cent. of the capital stock having been subscribed in good faith by subscribers of whose solvency the commissioners are satisfied, they shall call the subscribers together, at such time and place as they may appoint, for the election of a board of directors and other officers, and the further organization of the proposed corporation; a majority in value of the subscribers being present in person or by proxy at such time and place, they must elect a board of directors from the subscribers, consisting of not less than three, nor more than nine members, and such other officers as they may deem necessary; the directors holding office for a term of twelve months thereafter, and until their successors are elected and qualified; and shall designate an officer of their election, or some person of their appointment, to receive from the commissioners the subscriptions for stock. Upon the delivery of the subscriptions to such officer or person, he shall require of the subscribers whose subscriptions are payable in money, without the privilege of discharge

in services, or labor, or property, the payment in cash of twenty per cent. thereof; and of the subscribers whose subscriptions are payable in money, with the privilege of discharging the same in stipulated service, or labor, or in the transfer or conveyance of property, contracts in writing signed by them, expressing such privilege, and binding them to the rendition of the services, or the performance of the labor, or the transfer or conveyance of the property, at such times as the board of directors may appoint; the proceedings of the meeting of the subscribers must be reduced to writing, and must be signed by them, and delivered to the commissioners, who must return and file the same in the office of the judge of probate; and the officer or person, to whom the subscriptions for stock have been delivered, must make a copy thereof, and verify the same by affidavit, stating in such affidavit from which of the subscribers he has received payment in cash of twenty per cent., and from which he has received contracts in writing, as hereinbefore specified. Upon the filing of such papers, the judge of probate must issue to the subscribers, their associates, and their successors, a certificate stating that they are duly organized as a corporation, under the name and style, and for the purposes expressed in the declaration, having the power, capacity and authority conferred by law.

1562. Powers of corporation.—When duly organized such corporation has power,—

1. To have succession by the corporate name for the period expressed in the declaration; and if a period of time be not expressed, perpetually.

2. To sue and be sued; and if deemed necessary, to have a corporate seal, and the same to alter at pleasure.

3. To hold, purchase, dispose of, and convey such real and personal property, as the nature of its business, and the purposes for which it is formed may require.

4. To appoint such officers and agents as may be deemed necessary for the transaction of its business, and the management and control of its affairs and property.

5. To make all needful by-laws, rules and regulations for the transaction of its business, the management and control of its affairs, and the uses and disposition of its property; and for the transfer of its stock, and for the creation and preservation of a lien upon the shares of its stockholders for the payment of any debt or liability they may incur to the corporation.

6. To carry on the business, or accomplish the purposes expressed in the declaration.

7. To borrow money, and to mortgage, or otherwise convey or pledge its property, real or personal, and its franchises, to secure the payment of the money so borrowed, or any other debt contracted by it; but it has not power to borrow a sum exceeding its capital stock, or at a rate of interest exceeding eight per cent., payable semi-annually; nor must such mortgage, conveyance, or pledge be made otherwise than by the consent of the holders of the larger part in value of the capital stock, expressed by vote at a meeting of the stockholders called for that purpose, of the time and place of which meeting, and of the purpose for which it is called, thirty days' notice is given each stockholder personally, whose residence is known, and by pub-

lication for four consecutive weeks in the newspaper published nearest to the place of business of the corporation.

Jan. 23, 1885, p. 100.

1563. Additional powers.—Such corporation, when duly organized, has, in addition, power to locate, construct and operate to and from its mines, furnaces, mills, factories, quarries or other works, railways, tramways, canals, or roads, or to acquire by purchase railways, tramways, canals, or roads, whereby a connection may be made to and with the principal place of its business, its mines, furnaces, mills, factories, quarries, or other works, and any public highway, turnpike, macadamized, plank, or other graded road, or railroad, or navigable waters, or to or with its mines, ore-beds, coking or cooling grounds, or timber lands; or canals or aqueducts to and from its mills or factories, or furnaces, or quarries, and any waters or water-courses; and such corporation has also power to transport, as a common carrier, persons or property on any railroad, or other road, or on any canal, or aqueduct, constructed or purchased by it, taking reasonable compensation. If necessary in the construction of such canals, aqueducts, railways, tramways, or roads, the corporation has power to condemn lands, or an interest or easement therein, private property, for a way and right of way, in the mode prescribed by law, such way and right of way not exceeding one hundred feet in width throughout the whole length of such canal, aqueduct, railway, tramway, or road; and without the consent of the owner of the land, the same must not be constructed through the yard, garden, orchard, stable-lot, gin-house, barn, or through the curtilage of a dwelling-house; and such corporation has power to erect, at such place as may be deemed convenient for its uses, depots, or other buildings, or structures, or wharves; and may purchase, hire, or charter vessels or boats for the transportation of its products or property; and may aid in the construction of railroads, or in the establishment of lines of vessels or boats, running to and from such depots, or other buildings, or structures, or wharves; but the owner of any land which may be taken under the provisions of this section, shall have the right to have all his property, of like kind with that transported by the corporation, carried by such corporation over or upon such canal, railway, or tramway, upon the payment of a just and reasonable compensation for such carriage.

1564. Crossing public roads, streets, navigable waters.—In the construction of its railways, tramways, or roads, the corporation may cross any public road or highway, but must place such road or highway in a condition satisfactory to the proper authorities of the county having control thereof; and may, with the consent of the proper authorities of a town or city, and upon such terms and conditions as may be agreed on with such authorities, use or cross the streets of such town or city; and may cross any navigable streams, but must not impair the navigation thereof.

1565. Consolidation of mining, quarrying, or manufacturing corporations.—Any two or more mining, quarrying, or manufacturing corporations may unite and consolidate their capital stock, property and business in the manner hereinafter provided.

1566. How proposal adopted; entry on minutes.—Such consolidation shall be made on the recommendation of the board of directors of each of the corporations proposed to be consol-

idated, when adopted by a vote of the persons holding the larger amount in value of the capital stock of each corporation. Such recommendation shall be submitted in writing by the board of directors to the meeting of stockholders, and, with the vote of the stockholders thereon, shall be entered on the minutes.

1567. How consolidation consummated.—When a proposal for consolidation has been thus adopted, the consolidation shall be carried out by an agreement in writing, sealed with the corporate seals, and signed by the presidents of the contracting corporations, reciting that such agreement is made with the consent of the stockholders of each of the corporations, given as provided above, and stating the terms and conditions of such consolidation. This agreement must be recorded in the office of the judge of probate of the county in which such corporations are located; or if they be located in different counties, in the office of the judge of probate in each county; and upon the filing of such agreement as above provided, the consolidation is complete.

1568. Name and charter of new corporation; changes.—On such consolidation, the parties may, by their agreement of consolidation, adopt the name and charter of either corporation as the name and charter of the consolidated corporation, and may make such changes and provisions, as to the amount of stock, and the number of directors of the consolidated corporation, as they may think proper.

1569. Property, rights and liabilities of new corporation; pending suits.—The corporation so formed by consolidation shall be entitled to all the property and rights of each of the corporations so uniting, and liable to the debts and obligations of each of them. Suits pending for or against either of such original corporations, at the time of consolidation, are not abated, and shall not be delayed thereby, but shall proceed in the name of the consolidated corporation.

1570. Board of directors; election; powers.—A board of directors, consisting of such number as may be prescribed by the by-laws, must be elected annually by the stockholders, and must hold office for a term of twelve months, and until their successors are elected and qualified; vacancies occurring in the board must be filled by the remaining directors; and the management of the property and business of the corporation is under the control of the directors, who have power to elect and appoint all officers, agents, and servants, removing them at pleasure, fixing their compensation, and prescribing their duties, and to exercise such other powers as may be delegated to them by the by-laws of the adoption of the stockholders.

1571. Stockholders meet annually.—The stockholders must meet annually at such time and place, and on such notice as may be prescribed by the by-laws.

1572. Increase of capital stock.—The capital stock of the corporation may be increased to a sum not exceeding ten million of dollars, by the vote of the persons holding the larger amount in value of the capital stock, at a meeting of the stockholders called for that purpose, of which meeting, and the purpose for which it is called, thirty days' notice must be given each stockholder personally, whose residence is known, and by publication for four consecutive weeks, in some newspaper published

in the town or city in which the corporation is located; and if at such meeting the persons holding the larger amount in value of the stock vote for such increase, the proceedings of the meeting must be reduced to writing, signed by the president, or chief executive officer of the corporation, and filed and recorded in the office of the judge of probate of the county; each stockholder is entitled to a preference in taking of the increased stock an amount in proportion to the amount of the original stock he may own.

CHAPTER 6.

RAILROAD COMPANIES.

1573 (1821). **Corporation may be formed.**—A corporation for the construction, building and operation of a railroad may be formed in the mode, having the powers and capacity, and subject to the duties and liabilities in this chapter expressed; such corporation consisting of not less than seven members, who are stockholders.

1574. Declaration filed in office of secretary of state.—Any number of persons, not less than seven, desiring to form a corporation for the purpose of constructing, building and operating a railroad, must file in the office of the secretary of state a declaration in writing, signed by each of them, stating,—

1. The names and residences of the subscribers.
2. The name and style of the proposed corporation, the terminal and such other points along the line of the proposed railroad as they may deem proper.
3. The amount of the capital stock of the proposed corporation, and the number of shares into which it is divided.
4. Any other matter they may deem it desirable to state.

1575 (1822). **Secretary of state issues commission.**—Upon the filing of the declaration, the secretary of state must issue to three or more of the subscribers a commission, constituting them commissioners to open books of subscription to the capital stock of the proposed corporation.

1576 (1823). **Notice and place of opening subscription books.**—The commissioners must, within ninety days after the date of their appointment, open books of subscription to the capital stock of the corporation, by giving thirty days' notice in some newspaper published in each of the counties through which the railroad is proposed to be built, of the time and place for the opening of the books of subscription in each of such counties; and if no newspaper is published in any of the counties, the notice giving the time and place of opening the books of subscription for that county shall be published in some newspaper in some other county on the line of the proposed railroad, and also by posting a written notice at the court-house of such county.

1577 (1824). **Subscription for stock.**—All subscriptions to or for the capital stock must be payable in money; but the commissioners may receive subscriptions payable in money, the subscribers having the privilege of discharging the same by the

rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at the reasonable value of such services or labor; or in property the corporation has capacity to acquire and hold, or in lands in any county through which such railroad may run, at the reasonable value thereof, the subscription stating the nature and character of such property, and when it is to be transferred or conveyed to the corporation.

1578 (1825, 1826, 1827). **Organization; certificate of incorporation.**—Ten per cent. of the proposed capital stock having been subscribed in good faith by subscribers, of whose solvency the commissioners are satisfied, they shall call the subscribers together, at such time and place as they may appoint, for the election of a board of directors and other officers, and the further organization of the proposed corporation; a majority in value of the subscribers being present in person or proxy at such time and place, they must elect a board of directors from the subscribers, consisting of not less than seven, nor more than eleven members, and such other officers as they may deem necessary; the directors holding office for a term of twelve months thereafter, and until their successors are elected and qualified; and shall designate an officer of their election, or some person of their appointment, to receive from the commissioners the subscriptions for stock. Upon the delivery of the subscriptions to such officer or person, he shall require of the subscribers whose subscriptions are payable in money, without the privilege of discharge in services, or labor, or property, the payment in cash of two per cent. thereof; and of the subscribers whose subscriptions are payable in money, with the privilege of discharging the same in stipulated services or labor, or in the transfer or conveyance of property, contracts in writing signed by them, expressing such privilege, and binding them to the rendition of the services, or the performance of the labor, or to the transfer or conveyance of the property, at such time as the board of directors may appoint; the proceedings of the meeting of the subscribers must be reduced to writing, must be signed by them, acknowledged before, and certified by a judge of probate under the seal of his office, and delivered to the commissioners, who must return and file the same in the office of the secretary of state; and the officer or person to whom the subscriptions for stock have been delivered, must make a list of the subscribers, and verify the same by affidavit, stating in such affidavit from which of the subscribers he has received money, the aggregate of the money received, where it is deposited, and from which of the subscribers he has received contracts in writing, as hereinbefore specified. Upon the filing of such papers, the secretary of state must issue to the subscribers to the declaration, their associates and successors a certificate of incorporation under the seal of the state, stating that they are duly organized as a corporation under the name and style designated in the declaration, having the powers, capacity and authority conferred by law; and thereafter such corporation must be deemed duly organized.

1579. Record kept by secretary of state.—After the issue of the certificate of incorporation, the secretary of state must record, consecutively, the declaration, the proceedings of the

meeting of subscribers as certified by the judge of probate, the verified list of the subscribers, and the affidavit thereto, and the certificate of incorporation; and for such record he is entitled to demand and receive fifteen cents for each hundred words, and for the certificate of incorporation a fee of two dollars.

1580. Powers of the corporation.—When duly organized, the corporation has power,—

1. To have succession by its corporate name for the period expressed in the declaration, or, if no period be expressed, perpetually.

2. To sue and be sued, to have a common seal, and to alter the same at pleasure.

3. To hold, purchase, dispose of, and convey such real and personal property as its uses and business may require.

4. To make all needful rules, regulations and by-laws for the transaction of its business and the management of its affairs.

5. To appoint such officers and agents as it may deem necessary, and the nature of its business may require, prescribing their duties, fixing their compensation, and removable at pleasure.

6. To provide for the transfer of its stock, and to make such by-laws as may be deemed necessary for the creation and preservation of a lien upon the stock of shareholders for all indebtedness or liabilities they may incur to or with the corporation.

7. To cause such examination and surveys for its proposed railroad to be made, as may be necessary to the selection of the most advantageous route, and, for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to liability for all damages which shall be done thereto.

8. To acquire and hold, by gift or purchase, or in payment of subscriptions for stock, or by condemnation in the mode prescribed by law, such lands as may be necessary for a way and right of way, not exceeding one hundred feet in width throughout the entire length of the road, with the right to cut down and remove all such trees and undergrowth outside thereof as might, by falling upon or shading the roadway, injure the same.

9. To acquire and hold, by gift or purchase, or in payment of subscriptions for stock, such other lands, or any interest therein, as may be necessary in making heavy excavations, or embankments, or for the purpose of wasting materials from earth excavations, or for borrowing earth or other materials for the construction of embankments, or for the protection and safety of the roadway.

10. To acquire and hold, by gift or purchase, or in payment of subscriptions for stock, lands for building depots, sidetracks, machine-shops, car-factories and other buildings necessary and incident to its business.

11. To consolidate with any railroad corporation now existing, or which may hereafter be organized under the laws of this state, in the mode, and under the conditions and terms hereinafter prescribed.

12. To purchase or lease, or to aid in the construction of any railroad connecting with its own road.

13. To increase or decrease its capital stock in the mode, and upon the terms and conditions hereinafter prescribed.

14. To borrow money for the purpose of building, or constructing, or operating its road, or for the payment of debts contracted for such purpose, or to secure the payment of debts contracted in the building, constructing, operating, or maintaining its road, and in the carrying on of the business thereof, or in the acquisition of property for its uses, by mortgage or deed of trust of its franchises, and its property, real or personal; and for money borrowed, or for any of its debts, may make and issue negotiable bonds, or bills of exchange, or promissory notes in any form, or other proper evidences thereof.

1581 (1842). **Right to cross navigable streams; to use, cross, or change public roads.**—The corporation is authorized, in the construction of its road, to cross navigable streams or waters, but in the erection and construction of bridges, trestles, or other structures, must not impair the navigation of such streams or waters; and the corporation is also authorized to use, or to cross, or to change public roads, when necessary in the building, construction, or maintenance of its roadway or track, but must place the public road used, or crossed, or changed, in a condition satisfactory to the authorities of the county having control thereof; but where practicable the track of the railroad must go under or over the public roadway.

1582 (1842). **Crossing or intersection of other railroads.** The corporation has authority to cross, or to intersect any railroad; and if such crossing or intersection cannot be made by contract or agreement with the corporation, or association, or persons having and controlling the railroad to be crossed, or with which an intersection is to be made, on the application of either party, the judge of probate of the county in which such crossing or intersection is to be made, must appoint three arbitrators, disinterested freeholders of the county, who, after notice to the parties, must meet at the place of crossing, or intersection, and hear such evidence as the parties may introduce, and must determine the terms and conditions upon which such crossing or intersection shall be made, and must reduce their award to writing, sign and file the same in the office of the judge of probate, by whom it must be recorded; and such crossing or intersection must be made in accordance with such award; but where practicable, the latest built road must go under or over the road to be crossed.

1583 (2008). **Consolidation of railroad corporations.** Whenever the lines of any two or more railroads, or contemplated railroads, chartered under the laws of this or any other state, which, when completed, may admit the passage of burden or passenger cars over any two or more of such roads continuously without break or interruption, such companies are authorized, before or after completion, to consolidate themselves into a single corporation, in the manner following: The directors of such corporations may enter into an agreement, under the corporate seal of each for consolidation, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of the directors thereof, which shall not exceed thirteen, the time and place of holding the first election of directors, the number of

As amended, Dec. 11, 1886, p. 166.

shares of capital stock in the new corporation, the amount of each share, the manner of converting the shares of capital stock in each corporation into shares in the new corporation, the manner of compensating stockholders in each of the two or more corporations who refuse to convert their stock into the stock of the new corporation, with such other details as they shall deem necessary to protect such consolidation; and such new corporation shall possess all the powers, rights and franchises conferred upon the two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by the provisions of this article. The stockholders in either of such corporations, who shall refuse to convert their stock into the stock of the new corporation, shall be paid at least par value for each of their shares held by them, if they shall so require, previous to the consolidation being consummated. Such agreement of the directors shall not be deemed to be the agreement of the two or more corporations until after it has been submitted to the stockholders of each of the corporations separately at a meeting thereof, to be called upon a notice of at least thirty days, specifying the time and place of such meeting, and the object thereof, to be addressed to each stockholder, when his place of residence is known, and deposited in the post-office, and published for at least three successive weeks in one newspaper in one of the cities or towns in which each of such corporations has its principal office of business, and has been sanctioned by such stockholders by a vote of at least two-thirds in amount of the stockholders present at such meeting, voting by ballot in regard to such agreement, either in person or by proxy, each share of capital stock being entitled to one vote. When such agreements of the directors have been so sanctioned by each of the meetings of the stockholders separately, after being submitted to such meetings in the manner above mentioned, then such agreement shall be deemed to be the agreement of the two or more corporations; *Provided*, That every such new corporation so formed shall keep an office in the State of Alabama, and be in all respects subject to the laws of the State of Alabama as a domestic corporation.

See Meyer v. Johnston, 53 Ala. 237; s. c. 64 Ala. 603; Warren v. M. & M. R. R. Co., 48 Ala. 582.

1584 (2009). **When merged in new corporation.**—Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the secretary of state, the two or more corporations mentioned shall be merged in the new corporation provided for in such agreement, to be known by the name therein mentioned; and the details of such agreement shall be carried into effect as provided therein.

1585 (2010). **Property and franchise of each corporation vested in new, and new corporation subject to liabilities of each.**—Upon the election of the first board of directors of the corporation created by such agreement, the rights and franchises of each of the two or more corporations, and their right and interest in and to every species of property, shall be deemed to be transferred to, and vested in such new corparation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way and all other rights

of property in the same manner, and to the same extent as if the two or more corporations had continued to retain the title and transact the business of such corporation; and the titles and the real estate acquired by either of the two or more corporations shall not be deemed to revert, or be impaired by means of anything in this chapter contained. And all rights of creditors, and all liens upon the property of either of the two or more corporations shall be preserved unimpaired; and the respective corporations shall continue to exist, so far as may be necessary to enforce the same. All the debts, liabilities and duties of either corporation shall thenceforth attach to such new corparation, and be enforced from the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it.

1586 (2011). **Aid to, or purchase and lease of other roads.** A corporation, heretofore or hereafter created for the purpose of building, constructing, or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation, organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with, and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of such corporations or companies has been called by the directors thereof, at such time and place, and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company, represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto.*

1587 (1843). **Lines may be extended, or branch roads constructed.**—A corporation, now existing, or which may hereafter be organized for the building, constructing and operating a railroad, has authority, for the purpose of extending its line, or forming a connection, to acquire, hold and operate a railroad without the state; or within the state may extend its road, or may build, construct and operate branch roads from any point or points on its line. As amended, Dec. 12, 1882, p. 21.

* By act approved February 23, 1887 (Pamph. Acts 1886–7, p. 63), it is enacted: "That any railroad company, incorporated by the laws of any other state, and now owning or operating, or which is or may be authorized to own or operate, by lease or otherwise, any railroad in this state, is hereby authorized and empowered, upon the resolution of its board of directors, to aid any railroad company incorporated under any general or special law of this state, in the construction, renovation, or operation of its railroad, by the indorsement or guaranty of its securities, which have been, or may be issued for such purpose, in such manner as may be agreed upon by the board of directors of the contracting companies, or by leasing, or by guaranteeing the rentals of any lease of any such railroad, on such terms as may be agreed upon by the said respective boards of directors."

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1588. Mode of making purchase or extension, or of construction of branch roads.—Such purchase, extension, or construction of such branch roads must be made by resolution of the board of directors, which must be submitted to a meeting of the stockholders, called for the purpose of its consideration; of the time and place of which meeting, and of the purpose for which it is called, thirty days' notice must be given to each stockholder, whose residence is known, and by publication for four consecutive weeks in a newspaper published at the principal place of business of the corporation, and at such meeting must be approved by the vote of a majority in value of the stockholders; and if such resolution is so approved, a copy thereof, and of the proceedings of the meeting of the stockholders, certified by the president and secretary, under the corporate seal, must be filed and recorded in the office of the secretary of state.

1589 (1850). **Increase of capital stock.**—A corporation organized under the provisions of this chapter has authority to increase its capital stock to a sum not exceeding ten millions of dollars; but such increase can be made only at a meeting of the stockholders called for that purpose, and by the vote of the persons holding the larger amount in value of the capital stock; of the time and place of which meeting, and of the purpose for which it is called, thirty days' notice must be given each stockholder personally, whose residence is known, and by publication for four consecutive weeks in a newspaper published at the principal place of business of the corporation; if at such meeting the persons holding the larger amount in value of the stock vote for the proposed increase, the proceedings of the meeting must be reduced to writing, and entered on the books or minutes of the corporation, and a copy thereof, verified by the certificate of the president and secretary, under the corporate seal, must be filed and recorded in the office of the secretary of state.

1590. Increase of bonded indebtedness.—The indebtedness of the corporation, evidenced by negotiable bonds, or bonds in any form, must not be increased, except at a meeting of the stockholders called for that purpose; of the time and place of which meeting, and of the purpose for which it is called, thirty days' notice must be given each stockholder personally, whose residence is known, and by publication for four consecutive weeks in some newspaper published at the principal place of business of the corporation; and such increase can be made only by the vote at such meeting of the persons holding the larger amount in value of the capital stock.

1591. Annual meeting of stockholders.—The stockholders must meet annually, at such time and place, and on such notice as may be prescribed by the by-laws, for the election of directors and other officers, and the transaction of business generally. At such annual meeting, any business authorized to be transacted at a special meeting may be transacted, if notice be given, as is required in reference to a special meeting, that such business will be considered and transacted.

1592. Quorum of stockholders; vote.—At all meetings of the stockholders, a majority of the stock must be represented by proxy, or by the stockholders in person; and each stockholder is entitled to one vote for each share of stock he may hold.

1593. Board of directors.—The business of the corporation is under the management and control of a board of directors, consisting of not less than seven, nor more than eleven members, holding and owning, in good faith, and in their own right, shares of the capital stock, who must be elected by the stockholders, at the regular annual meeting, and who hold office for a term of one year, and until their successors are elected and qualified; and who must elect one of their own number president of the corporation, and must elect or appoint such other officers or agents as may be deemed necessary, or as may be required by the by-laws, removing or discharging at pleasure the president, or other officers or agents; and must exercise all such powers as may be delegated to them by the by-laws of the adoption of the stockholders; vacancies occurring in the board must be filled by the remaining members.

1594. Stockholders' or directors' meetings may be held without the state.—By the consent in writing of all the holders of the capital stock, residing in this state, acknowledged before a judge of probate, and certified under the seal of his office, and filed and recorded in the office of the secretary of state, a corporation organized under the provisions of this chapter, or a corporation heretofore organized for the purpose of building, constructing and operating a railroad, may hold meetings of stockholders or of directors, at such place or places without the state, as may be designated by the by-laws of the corporation, of the adoption of the stockholders; but such corporation must keep a principal place of business within this state, and must there keep an agent, with whom must be deposited copies of the proceedings of such meetings; and must file with the secretary of state a certificate, signed by the president and secretary of the corporation, under the corporate seal, stating the name of such agent, and the principal place of business of the corporation; and a like certificate, as there may, from any cause, be a change of such agent; and copies of the proceedings of such meetings, as filed with such agent, and certified by him, or the copies filed with him, are admissible in evidence against the corporation; and service of process upon such agent, in any suit or proceeding against such corporation, must be deemed and taken as service on the corporation.

1595. Principal place of business within the state required.—All corporations organized under the provisions of this chapter, and all corporations heretofore created or organized, or deriving corporate power or authority under or from any law of this state, the purpose of which is or was the building, constructing and operating a railroad, must keep within the state a principal place of business, and must there have and keep an agent on whom process may be served for the corporation, in any and all suits or proceedings against it.

1596. Purchasers of railroads may organize as a corporation.—The purchasers of a railroad, existing under the laws of this state, not being less than seven in number, at any judicial sale, or other sale by authority of law, made since the adoption of the present constitution, or which may be hereafter made, may organize as a corporation, entitling themselves, their associates and successors to all the powers, rights and capacity of a corporation organized under the provisions of this chapter.

1597. Mode of organization.—Such purchasers must make a declaration in writing, signed by each of them, stating,—

1. The corporate name and style adopted by them.

2. Their names and places of residence, the capital stock of the proposed corporation, and the number of shares into which it is divided.

3. The purpose to organize as a corporation under this chapter, the property purchased by them, the name of the corporation to which it belonged, and the sale at which they purchased.

4. Such other matters as they may deem it desirable to state; which declaration must be filed and recorded in the office of the secretary of state; and upon the filing and record of such declaration, the secretary must issue to such purchasers, their associates and successors, a certificate of incorporation, in the manner hereinbefore provided, under the seal of the state, which must be recorded in his office; and thereafter such corporation must be deemed duly organized.

1598 (2052). **Purchasers under power in a mortgage or deed of trust.**—The purchasers of a railroad, the property of a corporation, at a sale under a power in a mortgage or deed of trust, or under a decree foreclosing a mortgage, deed of trust, or other security, if such mortgage, deed of trust, or other security embraced the franchises of such corporation, are entitled to, and shall have, hold and enjoy such franchises; provided they organize as a corporation, under the provisions of this chapter, in the mode prescribed in the preceding section.*

M. & M. R. R. Co. v. Steiner, 61 Ala. 559.

1599 (1855). **Subscriptions for capital stock; how payable.** Subscriptions to or for the capital stock of a corporation, organized under the provisions of this chapter, must be paid in such installments, or at such times and in such manner, as the board of directors may by resolution prescribe; and the board may prescribe that subscriptions payable in money, without the privilege to the subscriber of payment or discharge in services, or in labor, or by the transfer or conveyance of property, be paid in installments; and may prescribe, when the subscription may be paid or discharged in services, or in labor, or in the transfer or conveyance of property, when the services are to be rendered, or the labor is to be performed, or the property to be transferred or conveyed, appointing different times for the one or the other, as they may deem the interests of the corporation may require.

1600. Forfeiture of stock; suits to recover subscriptions. If, after twenty days' notice, given in such manner as may be appointed by the by-laws, or by resolution of the board of directors, any subscriber fails to pay the installment required of him, or to render the services, or to perform the labor, or to transfer or convey the property, as required of him by the resolution of the board of directors, a suit at law may be maintained against him for the recovery of such installment, or for the breach of his contract of subscription; and successive suits may be maintained for the recovery of installments, as called for by the board of directors, or for breaches of the contract of subscription, as they may occur; or, at the election of the board of directors, by resolution of the board, a forfeiture of his sub-

* Rewritten by joint committee.

scription for stock may be declared; and upon such declaration the subscriber is released and discharged from all liability to the corporation, upon his subscription for stock, or upon his contract to pay such subscription in services, or in labor, or in the transfer or conveyance of property, and ceases to be a stockholder; but his liability to the existing creditors of the corporation is not impaired by such forfeiture.

1601. Issue and transfer of stock.—Certificates of stock must not be issued until there has been full payment therefor, according to the terms of the subscription; no transfer of stock is valid and operative as to the corporation, without a surrender of the certificate, and a transfer in such manner as is by the by-laws authorized; and the corporation may keep an office at any place or places without the state the board of directors may appoint, for the transfer of stock held or owned by persons not residing within the state.

1602. Forfeiture of franchises by non-user.—A corporation organized under the provisions of this chapter forfeits its franchises, and ceases to exist, by non-user of its franchises for five consecutive years.

CHAPTER 7.

STREET RAILWAY COMPANIES.*

1603. Corporation, how formed.—Corporations for constructing, maintaining and operating street railways in a town or city, may be formed in the mode prescribed, and have the capacity and powers in this chapter expressed.

1604. Declaration of subscribers; contents.—Five or more persons, associating to form a corporation for the construction, maintenance and operation of a street railway, in a town or

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* On February 25 1887 (Pamph. Acts 1886–7, p. 144), an act was approved amending sections 1918 and 1921 of the Code of 1876; and the sections, as amended, are as follows:

"SECTION 1918. **Certificate and its specifications.**—Any number of natural persons, associating to form a corporation for the purpose of constructing and using a street railroad in, or in and near, or between any of the cities or towns of this state, must, under their hands and seals, make a certificate, which shall specify,—1. The name assumed by said company, and by which it shall be known. 2. The names of the cities or towns, and of the streets in such cities or towns, in, or in and near, or between which it is proposed to build the road, and a description of the lines upon which it is to be built, and the termini thereof. 3. The amount of capital stock necessary to construct such road."

"SECTION 1921. **Road located by authorities of cities or towns and counties; power to make and alter contracts.**—Such corporation shall have power to construct, maintain and use a street railroad upon the streets, and upon the lines, and between the termini named in the certificate, in any city or town, upon such terms, and in such manner as may be authorized by the ordinance or other lawful act of the proper authorities of such city or town, and upon any of the public roads of any county, upon such terms, and in such manner as may be so authorized by the proper authorities of such county; and such railroad company may contract with such counties, cities, or towns therefor, and the contract may be altered when both parties agree to the change."

On February 28, 1887 (Pamph. Acts 1886–7, p. 149), an act was approved, amending sections 1917 and 1923 of the Code of 1876; and the sections, as amended, are as follows:

"SECTION 1917. **Three or more persons may become a body corporate.**—Any number of natural persons, not less than three, may become a body corporate, with

city, must file in the office of the judge of probate of the county, a declaration in writing, signed by each of them, stating,—

1. The names and residences of the subscribers, and the name and style of the proposed corporation.

2. The amount of the capital stock, and the number of shares into which it is divided.

3. The name of the town or city, and the streets thereof, in and along, or through which, it is proposed to construct, maintain and operate such railway, with a description of the line upon which the railway is to be constructed, and the termini thereof.

4. Any other matter it is deemed desirable to state; which declaration must be accompanied with the consent in writing of the proper authorities of such town or city to the construction of such street railway.

1605. Issue of commission for opening books of subscription.—Upon the filing of such declaration, the judge of probate must issue to three or more of the subscribers a commission, authorizing them, at such time and place as they may appoint, to open books of subscription to the capital stock of the proposed corporation; of which time and place the commissioners must give notice for thirty days by publication in some newspaper published in the town or city.

1606. Organization of subscribers.—Ten per cent. of the capital stock having been subscribed in good faith by stockholders, whose solvency is satisfactory to the commissioners, notice thereof must be given to the subscribers, and a time and place for them to meet appointed by the commissioners; and at such time and place, if a majority of the subscribers, having the larger part in value of the stock subscribed for, are present in person or by proxy, they must proceed to elect from the subscribers for stock a board of seven directors, who hold office for a term of twelve months, and until their successors are elected and qualified; and must elect an officer, or appoint some suitable person, to receive from the commissioners the subscriptions for stock, to hold the same subject to the order of the board of directors, and for the uses of the corporation; the proceedings of such meeting must be reduced to writing, and must be signed by the subscribers present, and delivered to the commissioners, who must file the same, with the commission issued to them, in the office of the judge of probate.

1607. Certificate of incorporation.—On the filing of such proceedings, the judge of probate must record the declaration,

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all the rights, powers and privileges conferred, and made subject to all the restrictions of this article."

"SECTION 1923. **Opening books of subscription; choosing directors, and their term of office.**—The persons named in the certificate of incorporation, or any three of them, shall be authorized to open books of subscription to the capital stock of the company, at such time and place as they may deem expedient, and as soon as ten per cent. of the amount of the capital stock named in the certificate shall be subscribed, they may call the subscribers together, at such time and place as they may designate, for the purpose of choosing not less than three, nor more than nine directors, who shall continue in office until the time fixed for the annual election, and until their successors are elected and qualified."

This chapter was rewritten and re-arranged by the Code commissioners, and hence, an attempt to *substitute* the sections of the Code, as amended, above set forth, would lead to confusion, if, under the re-arrangement, such substitution were practicable. The amendatory acts are, therefore, given in a note, leaving the text as it was when this Code was adopted.

commission and the proceedings of the meeting of the subscribers, and thereupon must issue a certificate of incorporation, under the seal of his office, stating therein the name and style of the corporation as designated in the declaration, and that the subscribers, their associates and successors are a body politic and corporate for the purposes expressed in the declaration, having the capacity and powers conferred by law, and must record such certificate; and thereafter the corporation must be deemed and taken as duly organized.

1608. Powers of corporation.—The corporation, when duly organized, has capacity and power,—

1. To have succession by its corporate name for the period expressed in the declaration; or, if no period be expressed, perpetually.

2. To sue and be sued; and if deemed necessary, to have and use a common seal, and the same to alter at pleasure.

3. To appoint such officers, agents and servants as the business of the corporation may require, prescribing their duties, fixing their compensation, and removing them at pleasure.

4. To make such by-laws and rules as are necessary for the regulation of the business, and the management of the property of the corporation; and for the transfer of its stock; and for the creation and preservation of a lien on the shares of stockholders, for any debt or liability incurred by them to the corporation.

5. To acquire, hold, dispose of, and convey such property, real and personal, as may be necessary to the uses and business of the corporation.

6. To construct, maintain and operate a street railway upon the streets, and upon the line, and between the termini mentioned in the declaration, and in the written consent of the proper authorities of the town or city.

7. To borrow money, and to secure the payment thereof by mortgage, or by deed of trust, conveying its property and franchises, not exceeding its capital stock, and at an interest not exceeding eight per cent., payable semi-annually.

1609. Contract with municipal authorities; compensation. The proper authorities of the town or city and the corporation have authority to contract to and with each other in reference to the use of the streets, the manner of the construction of the railway, the mode of operating it, and the compensation for the carriage of persons or property, to which the corporation is entitled; the corporation has power to use steam, or electric force, or mechanical power, or animals, as it may deem expedient; and is entitled to reasonable compensation for the carriage of persons or property; and may commence demanding and receiving tolls, or fares, when a continuous line of railway, one-quarter of a mile in length, is completed.

1610. Board of directors; election; powers.—The directors must be elected annually by the stockholders, and must hold office for a term of twelve months, and until their successors are elected and qualified; vacancies occurring in the board must be filled by the remaining directors; and the management of the property and the business of the corporation is under the control of the directors, who have power to elect and appoint all officers, agents and servants, fixing their compensa-

tion, prescribing their duties and removing them at pleasure; and to exercise such other powers as may be delegated to them by the by-laws of the adoption of the stockholders.

1611. Stockholders meet annually.—The stockholders must meet annually, at such time and place, and on such notice, as may be prescribed by the by-laws.

1612. Increase of capital stock.—The capital stock of the corporation may be increased by the vote of the persons holding the larger amount in value of the stock, at a meeting of the stockholders called for that purpose, of which meeting, and the purpose for which it is called, thirty days' notice must be given each stockholder personally, whose residence is known, and by publication for four consecutive weeks in some newspaper published in the town or city in which the railway is being operated; and if at such meeting the persons holding the larger amount in value of the stock vote for such increase, the proceedings of the meeting must be reduced to writing, signed by the president, or chief executive officer of the corporation, and filed and recorded in the office of the judge of probate of the county.*

CHAPTER 8.

MACADAMIZED, TURNPIKE AND OTHER TOLL-ROAD COMPANIES.

1613 (1860). **Mode of creating corporation for such purposes.**—Any number of persons, not less than seven, can be incorporated for the purpose of constructing and operating a macadamized, turnpike, plank, wooden, shelled, graded, or other improved toll-road, in the manner following:

1. They must give notice of the time when, and the place where books will be opened for subscription to the capital stock, by advertisement for six successive weeks in each county through any part of which such road is intended to pass, and also by publication in a newspaper published in one of such counties for twenty days, or, if there be no such paper, then in one nearest the intended line of such road.

2. When, after such notice, stock to the amount of at least five hundred dollars for each mile of such road is taken in good faith, the subscribers, on such notice as they may determine, may elect directors, and the directors from one of their number may elect a president.

3. The stockholders must subscribe articles of association, specifying the name of the corporation, residences of the stockholders respectively, the amount of capital stock and the number of shares, the number of shares taken by each stockholder,

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*By act approved December 10, 1886 (Pamph. Acts 1886–7, p. 122), it is enacted "that street railroad companies, organized and incorporated under the laws of Alabama, may acquire, by gift, purchase, or condemnation, real estate in this state, for the right of way for street railroads, a strip, tract, or parcel of land, not exceeding thirty feet in width, for the right of way of said street railroads; and said street railroad companies shall have the right to condemn and take possession of said land, on payment to the owner thereof a just compensation, in the same manner as now provided by law for taking private property for railroads and other public uses, in Article II., Chap. 17, Title 2, Part 3 of the Code."

the number and names of the directors, and the route of the road, designating the counties, towns and villages through which it will pass, and its estimated length.

4. Upon stock being subscribed as above required for each mile of road, and the payment in cash of five per cent. of the whole amount subscribed, three directors must make an affidavit of such facts, and file the same, with a certified copy of the articles of association, in the office of the secretary of state, and thereupon such stockholders, their associates and successors are a body corporate by the name specified in such articles.

1614 (1862). **Certified copy of articles evidence.**—A copy of the articles of association, certified by the secretary of state, is presumptive evidence of the incorporation of such corporation, and of the facts stated in the articles.

1615 (1861). **Powers.**—Such corporation has power, in the mode prescribed by law, to condemn lands through which its road will pass, for a right of way, or may acquire such right of way by gift, or purchase, or in payment of subscriptions for stock; to hold, convey, and dispose of all such property, real and personal, as may be necessary for its uses and purposes; to borrow money; to make and issue negotiable paper; to mortgage its property and franchises; to create such officers as may be necessary for the conduct of its business; to prescribe their duties and fix their compensation; and to do all such other acts as may be necessary to carry out the objects and purposes of its formation.

1616 (1888, 1890, 1891). **Directors.**—The business of such corporation shall be managed by a board of not less than five directors, who hold office for one year, and until their successors are elected and enter upon the discharge of their duties. They must at their first meeting elect one of their number president. Vacancies in the board must be filled by the remaining directors.

1617 (1888, 1889, 1892). **Election of directors.**—Directors shall be elected from among the stockholders at such time and place as the stockholders may prescribe, not less than twenty days' notice thereof being first given. Each shareholder, present in person or by proxy, is entitled to one vote for each share which he has held for thirty days previous to the election.

1618 (1880, 1881). **Calling installments on stock.**—The directors may prescribe the amount of the installments to be paid on the stock subscribed, and the time and place of payment; and if any stockholder fail to pay any such installment, his stock may, after thirty days' notice, be declared forfeited, and enures to the benefit of the corporation.

1619 (1902). **When directors personally liable.**—The debts and liabilities of any corporation, formed under the provisions of this chapter, must not exceed in amount, at one time, fifty per cent. of the amount of its capital actually paid in; and if there is such excess at any time, the persons who were directors at the time of the creation thereof are jointly and severally liable for such excess, unless it is shown that they voted against contracting such debt or liability.

1620 (1893). **Capital stock increased to complete road.** The capital stock of the corporation may be increased by consent of the persons holding the larger amount in value of the stock, first obtained at a meeting held after thirty days' notice of the

time, place and purpose thereof has been given personally to each stockholder, whose residence is known, and by publication for four consecutive weeks in a newspaper published at the principal place of business of the corporation. The increase so determined on is to be deemed authorized, upon the filing of a certificate of the action of such meeting, signed by the president and secretary of the corporation, with the secretary of state.

1621 (1901). **Individual liability of stockholders.**—No stockholder is individually liable for the debts or liabilities of the corporation beyond the unpaid stock owned by him.

1622 (1863, 1864). **Application for authority to locate road.** Such corporation shall make application to the court of county commissioners of each county through which any part of the road will pass, for authority to construct the same therein. The application shall state the kind of road proposed, and the route, as specified in the articles of association.

1623 (1865). **Notice.**—Notice of such application shall be given, by publication for four successive weeks in newspapers published in the respective counties, and, if in any county there should be no paper published, then the notice must be posted at the court-house door for four weeks before the hearing.

1624 (1866). **When granted.**—Any person, owning real estate in the county in which the application is made, may show cause against such application. If the court is of opinion that the public interest would be benefited by constructing such road in or through the county, it must make an order authorizing the construction of the same on the route proposed, and a copy of the order shall be recorded in the office of the judge of probate.

1625 (1867). **How road laid out.**—No such road shall be laid out through any orchard to the injury or destruction of fruit trees, or through any garden, dwelling-house, or building connected therewith, or any enclosure necessary for the use thereof, without the consent of the owner. Such corporation shall not bridge any navigable stream so as to obstruct the navigation thereof, or any other stream in a way which will prevent the passage of a raft twenty-five feet in width.

1626 (1884). **Width of road.**—All roads constructed under the provisions of this chapter must be so constructed as to allow carriages and other vehicles to pass each other conveniently, and pass on and off at intersections with other roads.

1627 (1883). **Towns may convey land to such corporation.** The corporate authorities of any city or town may convey to such corporation land within the corporate limits for the construction of such road.

1628 (1916). **Changes in road by commissioners.**—The court of county commissioners may change the direction, width, character and grade of any such road, upon application in writing, specifying particularly the proposed change, signed by stockholders representing more than one-half of the capital stock of the corporation, which fact shall be sworn to by the president and secretary of the corporation.

1629 (1879). **Branch roads.**—Any corporation formed under this chapter may construct branch roads by consent of the courts of county commissioners of the counties through which

the same will pass, and obtaining the right of way by purchase or condemnation.

1630 (1882, 1885, 1887, 1913). **Tolls; bridges; gates.**—On the completion of three miles or more of such road, the corporation may charge reasonable tolls, and may charge reasonable tolls on all bridges erected for persons and property passing thereon, which tolls must be defined and regulated by the board of directors. The rates shall be published, and can in no case be increased, except at the annual meetings of the stockholders. The corporation may erect gates and suitable buildings for the toll-keepers.

1631 (1886). **Exemptions from tolls.**—No toll must be taken from any person passing from one part of his farm or plantation to another part thereof, or from persons going to or from funerals or places of religious worship, or to or from military musters or drills, in which they participate as members of the state troops or militia, or to or from elections at which such persons are authorized to vote; no toll must be taken from any person traveling on foot, or going to or from any grist-mill with grain for family use, or to or from a blacksmith shop for work, or going for a physician and returning.

1632 (1915). **Tolls fixed by county commissioners reasonable.**—Such corporation may apply to the court of county commissioners of the county in which the longest portion of its road is located to fix the rates of toll, and the rates thereupon fixed by the court shall be considered reasonable.

1633 (1913, 1914). **Penalty for over-charge.**—Any such corporation that fixes, collects, or attempts to collect an unreasonable toll for the transit of persons or property over its road, bridges, or causeways, or permits any of its officers, agents, or employes to fix, collect, or attempt to collect an unreasonable toll, shall forfeit one hundred dollars, one-half to the person suing and the other to the state. In all such cases, the question whether the toll is reasonable shall be left to the jury.

1634 (1911). **Penalty for evading gate.**—Any person evading a gate on such road shall, in addition to the customary toll to the corporation and costs of suit, pay a penalty of five dollars, one-half to the party suing, the other to the county treasury, to be recovered before any justice of the peace.

1635 (1912). **Trial; amendment.**—When any person is so sued under a wrong name or description, the misnomer or misdescription may be corrected by amendment. All proceedings hereunder shall be at such place, and on such notice as the justice may fix; but the defendant may postpone the trial for a period not longer than ten days.

1636 (1905). **Judge of probate appoints road commissioners.**—The judge of probate of each county through or into which any such road runs, must appoint three discreet freeholders of the county commissioners, who shall hold office for one year and until their successors are appointed.

1637 (1906). **Commissioners must examine roads and open gates.**—Upon the application of any two freeholders or householders, any two commissioners must examine the condition of such road within their county, and if it appear upon examination that the road is so out of repair as not to afford a safe and convenient transit for persons or property, they must throw

open the toll-gates of the road, and without delay make return of their examination and action, under oath, to the judge of probate.

1638 (1907). **When road in order, commissioners so report.** Whenever such corporation applies to the commissioners, any two of them shall examine the road so declared out of repair, and if upon such examination the road is found in proper order, they must forthwith report that fact, under oath, to the judge of probate, and thereupon toll may be received on such road as before.

1639 (1908). **Liability of gate-keeper for charging toll on road out of repair.**—If any gate-keeper or other person shall, after the road is declared out of repair, and before it has been reported in order, charge or receive toll from any person or for any property passing over the road, he shall be liable for five times the amount of the toll and for costs, to be recovered before any justice of the peace of the county where the toll was received or charged.

1640 (1910). **Pay of commissioners.**—The commissioners appointed under this chapter shall be entitled to one dollar and fifty cents for each day they are engaged in the discharge of their duties, to be paid by the party applying for the examination, but the amount so paid may be recovered of the corporation, if the road is reported out of repair.

1641 (1909). **Office.**—The president and directors of such road corporation shall hold their meetings and keep the principal office for the transaction of the business of the corporation in the county in which the principal portion of the road lies, or at a terminus thereof; and all acts of the corporation in violation of the provisions of this section are null and void.

1642 (1894). **How process served.**—All legal process may be served on such corporation by leaving the same at such office with any person in charge, on any day except Sunday.

1643 (1895). **Book of officers and stockholders.**—Such corporation must cause a book to be kept, containing, in alphabetical order, the names of the president and directors, the names of all stockholders for six years next preceding, the number of shares of each, and the time when each became the holder thereof, which book must be free to the inspection of all persons at least six hours of each day, except Sunday, at such office.

1644 (1896). **Transfer of stock.**—No transfer, hypothecation, or other lien of stock is valid against judgment-creditors with lien, or subsequent purchasers, without notice, except from the time that it is registered upon such book.

1645 (1897, 1898). **Transcript from book; penalty for not furnishing.**—Any person may obtain a transcript from such book, on application at the office to the president or other officer of the corporation, and tender of the fees for transcribing, at the rate of twelve and one-half cents per hundred words; and the officer must certify that the transcript is correct. Any officer, failing to furnish such certified transcript for five days after such demand and tender, forfeits two hundred dollars to the party aggrieved.

1646 (1899). **Book or transcript evidence.**—Such book or

certified transcript is presumptive evidence for the plaintiff in any suit or proceeding against the corporation or stockholders.

1647 (1900). **Failure to keep book or allow inspection.** Any such corporation failing so to keep such book forfeits its corporate powers; and any officer neglecting or failing to permit its inspection forfeits to the person demanding inspection two hundred dollars.

1648 (1903). **Forfeiture for not prosecuting work.**—Every corporation formed under the provisions of this chapter ceases to be a body corporate, if, within two years from filing its articles of association, it has not commenced the construction of its road, and in good faith expended thereon at least ten per cent. of the amount of its capital, or if, within four years, it has not so expended twenty per cent., and in the same rate for every two successive years until the road is completed.

1649. Purchasers may become incorporated.—Any three or more persons, or their assigns, holding by purchase, voluntary or under legal process, the larger amount of the interest in the road-bed of any macadamized, turnpike, plank, wooden, shelled, graded, or other improved road, previously owned and operated as a toll-road by any corporation under the laws of this state, may organize themselves into a body politic and corporate for the benefit of themselves, their associates and successors; and by purchasers hereunder is meant the persons actually furnishing the consideration, and not the trustees merely. Dec. 8, 1882, p. 9, secs. 1, 2.

1650. Manner of incorporation.—Such purchasers shall elect directors and select a corporate name, and, upon filing with the secretary of state within four months, a certificate of the proceedings so had, signed and verified by the oath of some person appointed by such purchasers so organizing to keep a record of the proceedings, showing the name of the original corporation, the new corporate name selected, and the names of the purchasers so organizing, the incorporation shall be deemed complete, and the corporation fully organized and entitled to exist under the name selected, and to have all the rights, privileges, immunities and franchises of the original corporation, to be held in all cases as if acquired under the constitution of 1875. The corporation has power to sell, mortgage, or otherwise encumber or dispose of its rights, franchises and property of every kind. Ib. secs. 1, 4, 5.

1651. Certificate recorded; evidence.—Such certificate shall be recorded by the secretary of state in his office, and a certified copy thereof by the secretary shall, in all courts and proceedings, be presumptive evidence of the incorporation and the proceedings therefor. Ib. sec. 4.

CHAPTER 9.

TELEGRAPH COMPANIES.

1652 (1930). **Right to construct and maintain lines along public highways.**—Any telegraph company, incorporated under the laws of this or any other state, shall have the right to construct, maintain and operate lines of telegraph along any of the railroads or other public highways in this state; but such

lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway.

1653 (1931). **Power to contract.**—Such telegraph company shall have power to contract with any persons or corporation, the owner of any lands, or of any franchise or easement over which such telegraph line is proposed to be erected, for the right of way for planting, repairing and preserving its telegraph poles, and for the erection and occupation of offices, at suitable distances for the public accommodation.

1654 (1932). **Right of way.**—Such telegraph company shall be entitled to the right of way over the lands, franchises and easements of other persons and corporations, and the right to erect poles, and to establish offices, upon making just compensation as now provided by law.

CHAPTER 10.

NAVIGATION COMPANIES.

1655 (1933). **Mode of forming navigation companies.**—Any two or more persons, who desire to operate a line of steamships or other water-craft navigating the sea to and from the port of Mobile to any other port of the United States or of any foreign country, may become incorporated and enjoy all the benefits and privileges of a charter to the same extent as if a charter were granted by a special act of the general assembly, who shall comply with the following conditions,—

1. The person designing to establish such line must, by a declaration in writing, state the object of the company, the name to be assumed, the amount of capital stock to be raised, the number of shares into which it is to be divided, and the names of the shareholders; but the capital stock shall in no case be less than twenty-five thousand dollars, or more than eight hundred thousand dollars, and each share shall be of the value of not less than fifty, and not more than one thousand dollars. Such declaration shall be subscribed by contributors holding at least one-third of the stock, or by their authorized agents, and filed in the office of the secretary of state, verified by the oath of at least two subscribers before any judge of probate or circuit judge.

2. Upon the filing of such declaration, and upon certificate that one-third of the proposed capital stock has been actually paid in cash into a bank doing business in Mobile to the credit of the corporators, or of some person designated in their declaration as trustee for them, which certificate may be by the cashier of the bank under its seal, the governor must issue to such subscribers, their associates and successors letters patent, under the great seal of the state, declaring them a body politic and corporate under the name and style stated in the declaration.

3. Every corporation formed under this section shall have a president, treasurer and such other officers and agents as its business may require, and may also have a board of not more

than ten, nor less than five directors. Such officers shall be appointed in such manner, and for such time as the company, by its by-laws, may provide.

4. After the issue of such letters, whatever money may stand in any bank to the credit of the company, or the trustee, is subject to the check or draft of the treasurer, countersigned by the president, or to the check or draft of such other officer as the by-laws may direct.

1656 (1934). **Powers.**—Upon complying with the above requisitions. the company shall be deemed duly organized under the name adopted in such declaration, and shall have perpetual succession and all the rights, privileges and immunities, and liable to all the obligations of a private corporation. Such subscribers, their associates and successors shall have full power to fill all subscriptions to the capital stock to the amount named in their written declaration, and to the amount of eight hundred thousand dollars, if they file a new declaration to that effect with the secretary of state; to purchase, build, equip, charter, own and sell vessels propelled by steam, or otherwise, to navigate the Gulf of Mexico and other seas between Mobile and the ports in the declaration named, and to purchase, build, equip, charter, own and sell and run such auxiliary vessels as may be necessary; to provide fuel and other necessaries; and to erect, purchase, lease, hold and convey such buildings and real estate as may be necessary to the efficient management of the business of the company. The company may further adopt such by-laws for the management of its business, not inconsistent with law, as it may see fit; but no company organized hereunder shall have banking privileges, or powers not necessary for managing a line of vessels carrying freight and passengers.

1657 (1935). **Special meetings.**—The president of the company, on the written request of stockholders owning one-third of the capital stock paid in, shall call a special meeting of the stockholders, after giving twenty days' notice, which shall state specifically the object of the meeting; and only the object so stated shall be acted on thereat. The treasurer, or other accounting officer of the company, must, on a similar request, furnish a written statement of the company's accounts and the condition of its pecuniary affairs.

1658 (1936). **Winding up affairs of company.**—When, from any cause, it becomes necessary to wind up the affairs of the company, and an amicable arrangement cannot be made among the parties interested, the chancellor of the southern chancery division must, upon application by bill of parties interested to the extent of twenty-five thousand dollars, appoint three suitable commissioners, who may be required to give bond with sufficient sureties, to be approved by the chancellor, for the faithful performance of the trust, whose duty it is to take possession of the assets, and, as speedily as practicable, under the direction of the chancellor, wind up the affairs of the company, and make due distribution among the parties in interest.

CHAPTER 11.

CORPORATIONS NOT SPECIALLY PROVIDED FOR.

1659. Corporations for any industrial business or lawful enterprise.—Two or more persons, associating themselves for the carrying on of any industrial business, or for any lawful enterprise, if not otherwise provided by law, may form themselves into a private corporation, in the mode and with the capacity and powers in this chapter expressed.

1660. Declaration to be filed in office of judge of probate; contents.—The persons so associating must file in the office of the judge of probate of the county in which it is proposed the corporation shall have its principal place of business, a declaration in writing, signed by each of them, stating,—

1. The names and residences of the subscribers, and the name and style of the proposed corporation.

2. The general purposes of the corporation, the nature of the business intended, and the principal place of business or location of the corporation.

3. The amount of the capital stock and the number of shares into which it is divided.

4. Any other matter it is deemed desirable to state.

Central A. & M. Asso'n. v. Ala. Gold Life Ins. Co., 70 Ala. 121.

1661. Commission issued by judge of probate.—Upon the filing of the declaration, the judge of probate must issue to two or more of the subscribers to the declaration a commission, authorizing them, as commissioners, to open books of subscription to the capital stock of the corporation at such times and places as they may appoint.

1662. Subscriptions for stock.—All subscriptions to or for the capital stock must be payable in money; but the commissioners may receive subscriptions payable in money, the subscriber having the privilege of discharging the same by the rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at the reasonable value of such services or labor, or in property, at the reasonable value thereof, the corporation has capacity to acquire and hold, the subscription stating the nature and character of such property, and when it is to be transferred or conveyed to the corporation.

1663. Organization of corporation.—Fifty per cent. of the proposed capital stock having been subscribed in good faith by subscribers, of whose solvency the commissioners are satisfied, they shall call the subscribers together at such time and place as they may appoint for the election of a board of directors and other officers, and the further organization of the proposed corporation; a majority in value of the subscribers being present in person or by proxy at such time and place, they must elect a board of directors from the subscribers, consisting of not less than three, nor more than nine members, and such other officers as they may deem necessary; the directors holding office for a term of twelve months thereafter, and until their successors are

elected and qualified; and shall designate an officer of their election, or some person of their appointment, to receive from the commissioners the subscriptions for stock. Upon the delivery of the subscriptions to such officer or person, he shall require of the subscribers whose subscriptions are payable in money, without the privilege of discharge in services, or labor, or property, the payment in cash of twenty per cent. thereof; and of the subscribers whose subscriptions are payable in money, with the privilege of discharging the same in stipulated services or labor, or in the transfer or conveyance of property, contracts in writing signed by them, expressing such privilege, and binding them to the rendition of the services, or the performance of the labor, or the transfer or conveyance of the property, at such times as the board of directors may appoint. The proceedings of the meetings of the subscribers must be reduced to writing, and must be signed by them and delivered to the commissioners, who must return and file the same in the office of the judge of probate; and the officer or person to whom the subscriptions for stock have been delivered, must make a copy thereof, and verify the same by affidavit, stating in such affidavit from which of the subscribers he has received payment in cash of twenty per cent., and from which he has received contracts in writing, as hereinbefore specified; upon the filing of such papers, the judge of probate must issue to the subscribers, their associates and their successors a certificate stating that they are duly organized as a corporation, under the name and style, and for the purposes expressed in the declaration, having the powers, capacity and authority conferred by law.

1664. Powers of corporation.—When duly organized such corporation has power,—

1. To have succession by the corporate name for a period of twenty years, if a less period be not expressed in the declaration.

2. To sue and be sued; and, if deemed necessary, to have a corporate seal, which may be altered at pleasure.

3. To hold, purchase, dispose of, and convey such real and personal property as the nature of its business may require.

4. To appoint such officers and agents as may be deemed necessary for the transaction of its business, and the management and control of its affairs and property.

5. To make all needful by-laws, rules and regulations for the transaction of its business, the management and control of its affairs, and the uses and disposition of its property; and for the transfer of its stock, and the creation and preservation of a lien upon the shares of its stockholders, for the payment of any debt or liability they may incur to the corporation.

6. To carry on the business, or accomplish the purposes expressed in the declaration.

7. To borrow money, and to mortgage, or otherwise convey or pledge its property, real or personal, and its franchises, to secure the payment of the money so borrowed, or any other debt contracted by it; but it has not power to borrow a sum exceeding its capital stock, or at a rate of interest exceeding eight per cent., payable semi-annually; nor must such mortgage, conveyance, or pledge be made otherwise than by the consent of the holders of the larger part in value of the capital stock, ex-

pressed by vote at a meeting of the stockholders, called for that purpose, of the time and place of which meeting, and of the purpose for which it is called, thirty days' notice is given each stockholder personally, whose residence is known, and by publication for four consecutive weeks in the newspaper published nearest to the place of business of the corporation.

1665. Board of directors; election; powers.—A board of directors, consisting of such number as may be prescribed by the by-laws, must be elected annually by the stockholders, and must hold office for a term of twelve months, and until their successors are elected and qualified; vacancies occurring in the board must be filled by the remaining directors; and the management of the property and business of the corporation is under the control of the directors, who have power to elect and appoint all officers, agents and servants, removing them at pleasure, fixing their compensation, and prescribing their duties; and to exercise such other powers as may be delegated to them by the by-laws of the adoption of the stockholders.

1666. Stockholders meet annually.—The stockholders must meet annually, at such time and place, and on such notice, as may be prescribed by the by-laws.

1667. Increase of capital stock.—The capital stock of the corporation may be increased to a sum not exceeding one million of dollars, by the vote of the persons holding the larger amount in value of the stock, at a meeting of the stockholders called for that purpose, of which meeting, and the purpose for which it is called, thirty days' notice must be given each stockholder personally, whose residence is known, and by publication for four consecutive weeks in some newspaper published in the town or city in which the corporation is located; and if, at such meeting, the persons holding the larger amount in value of the stock vote for such increase, the proceedings of the meeting must be reduced to writing, signed by the president or chief executive officer of the corporation, and filed and recorded in the office of the judge of probate of the county; each stockholder is entitled to a preference in taking of the increased stock an amount in proportion to the amount of the original stock he may own.

1668. Renewal of incorporation.—An incorporation under this chapter may be renewed according to the provisions hereinbefore made, with the consent of a majority in value of the stockholders, expressed at a meeting of the stockholders called for that purpose.

CHAPTER 12.

GENERAL PROVISIONS.

1669. Shares of stock personal property.—Shares or interests in the stock of private corporations are personal property, transferable on the books of the corporation in such manner as is required by the by-laws, or by the rules and regulations of the corporation.

1670 (2043). **Transfer on books.**—When, by the charter, ar-

ticles of association, or by-laws and regulations of a private corporation, the transfer of the stock is required to be made upon the book or books of the corporation, no transfer of stock shall be valid as against bona fide creditors, or subsequent purchasers, without notice, except from the time that such transfer shall have been registered, or made upon the book or books of such corporation.

Jones v. Latham, 70 Ala. 164.

1671 (2044). **Must require register of transfer on books; transfer not registered void.**—It is the duty of every private corporation to require the transfer of its stock to be made or registered on the books of the corporation; and persons holding stock not so transferred or registered, or holding any stock under hypothecation, mortgage, or other lien, must have the transfer, hypothecation, mortgage, or other lien made or registered on the books of the corporation, or, upon failing to do so within fifteen days, all such transfers, hypothecations, mortgages, or other liens shall be void as to bona fide creditors, or subsequent purchasers without notice.

1672 (2038, 2039). **Transfer may be made by personal representative.**—An executor or administrator, deriving his appointment from a court of probate of this state, or if the testator or intestate resided without the state, from the proper tribunal of his domicil, may transfer the shares of stock held and owned by such testator or intestate in any private corporation existing under the laws of this state; payment of dividends on such stock may be made to such executor or administrator.

1673. Stock subject to levy and sale.—The shares of stock are subject to levy and sale under attachment or execution, as is other personal property; and the levy may be made with or without the officer having or obtaining possession of the certificate of stock, by indorsement on the attachment or execution, stating the number of shares, or other interest, on which the levy is made, and giving notice thereof to the custodian of the books of transfer, if he be known and reside within the state, or if he be unknown, or if he reside without the state, by posting notice at the court-house door of the county, and by publication for three consecutive weeks in a newspaper published at or near the principal place of business of such corporation; all transfers of the stock made in good faith and for a valuable consideration before notice of the levy is given, are valid and operative, and must prevail over the levy. The levy and the sale thereunder may be made in the county of the residence of the defendant, or in the county in which the corporation has its principal place of business; and on making the sale, the sheriff must make to the purchaser a transfer of the stock in writing; and the purchaser has the right to require the proper officer to register such transfer on the books of the corporation, and, with or without such registry, is entitled to all the rights and interests of the defendant as whose property such stock was sold.

Nabring v. Bank of Mobile, 58 Ala 204; Jones v. Latham, 70 Ala. 164.

1674. Lien of corporation on shares of stockholder.—All private corporations have a lien on the shares of its stockholders, for any debt or liability incurred to it by a stockholder before notice of a transfer, or of a levy on such shares; and if nec-

essary for the payment of such debt, or the satisfaction of such liability, the corporation may sell the shares after notice for thirty days, sent through the mail, postage paid, to the stockholder, or if he be dead, to his personal representative, at the post-office nearest his last known place of residence, or after personal demand of payment or satisfaction from either, if such demand be not complied with in thirty days; such sale to be made at public auction to the highest bidder, after ten days' notice of the time and place, by publication in some newspaper published at the principal place of business of the corporation, or nearest thereto.

See Cunningham v. Ala. Life Ins. & Trust Co., 4 Ala. 652; Mobile Mutual Ins. Co. v. Cullom, 49 Ala. 558; P. & M. Mutual Ins. Co. v. Selma Savings Bank, 63 Ala. 585.

1675. Increased capital stock; preference of stockholders. The stockholders of a private corporation, on an increase of the capital stock thereof, have the preference of taking such increased stock, in proportion to the amount of the original stock held and owned by them.

1676. Forfeiture by non-user.—The non-user of corporate franchises for a period of five consecutive years is a forfeiture of such franchise; and, if not otherwise provided, the failure to organize a private corporation for a period of two years after filing the declaration for incorporation is a forfeiture of all right to organize under such declaration.

1677. Books of corporation open to inspection.—The stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records and papers of the corporation, at reasonable and proper times.

1678 (2024). **Majority of board exercise corporate powers.** When the corporate powers are directed to be exercised by any particular body, or number of persons, a majority of such body or persons, unless it is otherwise provided, form a board for the exercise of such powers.

1679 (2026). **Failure to elect officers does not dissolve corporation.**—A failure to elect officers at the proper time does not dissolve the corporation, but those in office hold until the election or appointment and qualification of their successors.

1680. Change of number of directors.—All private corporations have power to increase or diminish the number of its directors, or other managers, with the consent of the persons holding the larger amount in value of the capital stock, expressed by the vote of such persons at a regular meeting of the stockholders, or at a meeting called for that special purpose, of which, and the purpose for which it is called, thirty days' notice is given each stockholder personally, whose residence is known, and by publication for four consecutive weeks in a newspaper published at the principal place of business of the corporation, or nearest thereto.

1681. Stockholders' meetings.—The stockholders of every private corporation must meet annually, at a time and place, and upon notice to be prescribed by the by-laws; and the board of directors, or other managers, have the power to call special meetings; and each stockholder is entitled to one vote for each share of stock held and owned by him; the failure to hold an-

nual meetings of the stockholders, or the failure to elect directors regularly, shall not operate a forfeiture of corporate franchises.

1682. Record kept by judge of probate; fees.—It is the duty of the judge of probate to keep a well-bound book, in which must be recorded, consecutively, the declaration of incorporation, the commission issued to the commissioners, the proceedings of the meeting of the subscribers on the appointment of the commissioners, the list of subscriptions returned to, and filed in his office, and the affidavit thereto, and the certificate of incorporation and organization; and for the record thereof he is entitled to fifteen cents for each hundred words, and to a fee of one dollar for the certificate of incorporation and organization, and to a fee of one dollar and fifty cents for the filing of the declaration, and for the issue of the commission to the commissioners.

CHAPTER 13.

DISSOLUTION OF BUSINESS CORPORATIONS.

1683 (2054). **Petition for dissolution.**—Whenever a majority of the stockholders of any private corporation, owning three-fourths of the stock, wish to dissolve the corporation, they may do so in the following manner: They shall file a petition in the chancery court of the division in which the corporation is located, or has its principal place of business, setting forth the names of all the stockholders and their residences, the amount of stock owned by each stockholder, as nearly as practicable all the property, real and personal, of the corporation, and stating that it is the wish of the petitioners to dissolve the corporation.

1684 (2055). **Notice by register.**—Upon the filing of such petition, the register shall give notice by subpœna to all the stockholders not joining in the petition to appear within thirty days after service and contest the same; and if any stockholder residing out of the state does not join in the petition, he shall be made a party by advertisement in the manner non-resident defendants in chancery are made parties, and he has thirty days after the perfecting of such notice to answer and contest the petition.

1685 (2056). **When dissolution decreed.**—If, at a regular term of the chancery court, after the cause is at issue, it be made to appear to the chancellor that a majority of the stockholders still wish to dissolve the corporation, proof being made as in chancery cases, the chancellor shall decree the corporation dissolved.

1686 (2057, 2059). **Receiver appointed; his duties.**—Upon decree of dissolution, the chancellor shall appoint a receiver of all the property and assets of the corporation. The chancellor shall direct the receiver to collect, by suit or otherwise, all the debts due the corporation, and sell property, real or personal, belonging to the corporation, and how he shall make title thereto to the purchaser; the chancellor may, in his discretion, authorize the receiver to proceed, without suit, to sell any or

all of the debts and assets of the corporation at public sale for cash, or on such terms as in his judgment the interest of the parties may require.

1687 (2058). **How selected; bond.**—The person nominated by the majority of the stockholders must be appointed receiver, if they can agree; but if they fail to agree for ten days after the decree of dissolution, the chancellor, in term-time or vacation, or the register in his absence, must appoint such receiver, requiring proper bond and sureties for the performance of his duties.

1688 (2060, 2061). **Receiver pays debts; contested claims.** In the performance of his duties under the decree, the receiver shall pay the debts of the corporation in full or ratably, as the funds realized may permit. If any claim is contested, it must be filed by the claimant in the court, and the genuineness thereof ascertained as in other contested claims in chancery. The residue, after the debts and costs are paid, shall be divided among the stockholders according to the amount of stock owned by each.

1689 (2062). **Appeal.**—Any party dissatisfied with the decree of dissolution may appeal, giving bond and sureties, as prescribed by the chancellor, and approved by the chancellor or register.

1690 (2027). **Powers after dissolution.**—All corporations whose powers expire by limitation, all which are dissolved by forfeiture or any other cause, exist as bodies corporate for the term of five years after such dissolution, for the purpose of prosecuting or defending suits, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their business.

1691 (2028). **Administration of affairs on dissolution.**—Upon the dissolution of any corporation, unless other persons are appointed by the general assembly, or by a court of competent authority, the managers of the business of the corporation at the time of its dissolution, by whatever name known, are the trustees of the stockholders and creditors, authorized to settle the affairs of the corporation, dispose of such property as is necessary to pay its debts, and divide among the stockholders the money and property remaining after payment of such debts and the necessary expenses.

1692 (2029). **Authority of officers.**—Such persons have authority to sue for and recover the debts and property of the dissolved corporation, in its corporate name, and are jointly and severally responsible to its creditors to the extent of the property which may come into their hands.

1693 (2030). **Time for settling extended.**—On proper application to the chancellor, the powers of such trustee, or person appointed receiver of such dissolved corporation, may be continued for such length of time beyond such five years as the chancellor may judge necessary for the purposes contemplated in the three preceding sections.

CHAPTER 14.

CORPORATIONS NOT OF A BUSINESS CHARACTER.

ARTICLE 1.—Religious, educational, benevolent and burial societies.
2.—Social and literary societies.

ARTICLE I.

RELIGIOUS, EDUCATIONAL, BENEVOLENT AND BURIAL SOCIETIES.

1694 (1991, 1994, 2000, 2001). **Election of trustees.**—The members of any church or religious society, of an educational society, benevolent society, or the owners of a grave-yard, desiring to become incorporated, shall elect not less than three, nor more than nine trustees.

1695 (1992). **Incorporation complete on trustees filing certificate.**—Such trustees shall, within thirty days after their election, file in the office of the judge of probate of the county in which the corporation is to exercise its functions, a certificate stating the corporate name selected, the names of the trustees, and the length of time for which they were elected; which certificate shall be subscribed by them, and recorded. The members of such society, their associates and successors are, from the filing of such certificate, incorporated by the name therein specified.

1696 (1996). **Powers.**—Corporations created under this chapter may hold real and personal property, not exceeding in value fifty thousand dollars, may receive property by gift, will, or devise, holding the same in conformity with all lawful conditions imposed by the donor, and exercise such other powers as are incident to private corporations.

1697 (1999). **How suits against commenced.**—In all suits or legal proceedings, the service of process and papers on a trustee of such corporation is valid for the purpose of bringing such corporation into court, or for the objects of the notice.

1698 (1997). **How church mortgage executed.**—The trustees, or other authorized agents of any society or church, organized by special charter, or under the general laws of this state, may, by mortgage or deed of trust, convey all, or any part of the property thereof, real or personal, to secure the payment of any debt contracted by the trustees or other authorized agents; but this section shall first have been accepted as an amendment to the organic law of such society or church, if not already a part of it, by a majority of the adult members of such society or church, assembled after ten days' notice of the time, place and object of such meeting, posted at the usual place of assembly, and published by announcement at a regular meeting for at least one week prior to such action; no such mortgage or deed of trust shall be executed without the consent of a majority of such trustees and of a majority of the adult members of such organization, voting thereon at a meeting assembled after ten days' notice as above.

1699 (1998). **Recital in minutes evidence.**—A recital upon the minutes of the proceedings of such society or church, that

such notice was given, and of the vote upon the question before the meeting, shall be evidence of the regularity of such meeting, and of the proceedings therein.

1700 (2003). **Special privileges of burial societies.**—Burial societies so incorporated may exercise all powers necessary for properly governing, beautifying, improving and taking care of such grave-yard, and may make such by-laws, rules and regulations as are proper and necessary to secure such objects.

1701 (2004). **Chairman of board.**—When such grave-yard is wholly under the control of persons belonging to one denomination of faith, the elder, deacon, minister, bishop, or priest, who is the head of such denomination in the city, town, village, or county, shall be ex-officio the chairman of such board of trustees; and when such grave-yard is under the control of persons of different denominations, such heads of the denominations interested shall be members of such board.

ARTICLE II.

SOCIAL AND LITERARY SOCIETIES.

1702 (2005). **Manner of incorporation.**—Whenever ten or more persons desire to form a society for the social and literary advancement of its members, they may become incorporated and entitled to all the privileges of private corporations in the following manner:

1. Such persons shall first adopt a constitution and elect officers, and such officers shall file in the office of the judge of probate of the county in which such society is located, a declaration in writing, stating the name, object and purposes of the society, the adoption of the constitution, the names and style of its officers, the number of its members, which shall in no case exceed one hundred and fifty, and whether such society issues shares of stock, or is formed for pecuniary purposes, and if so, then the amount of stock, the number of shares into which it is divided, and by whom held.

2. The declaration shall be signed by the officers, acknowledged or proved as in the case of deeds, and recorded in the office of such judge of probate.

1703 (2006). **Exemption from taxation.**—The property of corporations formed bona fide under this article, for other than pecuniary purposes, shall be, to an amount not exceeding two thousand dollars, exempt from all state, county and municipal taxation and licenses; but if used for any other purpose than legitimately pertains to the object of such society, it shall not be so exempt.

1704 (2007). **Forfeiture of charter for gaming.**—If any society, incorporated under this article, permit any games to be played for wager, it thereby forfeits its charter, and ceases to be a body corporate.

TITLE II.

REGULATIONS OF TRADE AND COMMERCE AS BETWEEN INDIVIDUALS.

CHAPTER 1.—Limited partnerships.
2.—Void contracts.
3.—Interest.
4.—Choses in action.
5.—Collateral securities; pledges

CHAPTER 1.

LIMITED PARTNERSHIPS.

1705 (2063). **For what purpose formed.**—Limited partnerships for the transaction of any mercantile, mechanical, manufacturing, or other lawful business, within this state, may be formed by two or more persons, upon the terms, and with the rights and powers, and subject to the conditions and liabilities in this chapter; but its provisions must not be construed to authorize any such partnership for the purpose of banking or insurance business.

McGehee v. Powell, 8 Ala. 827.

1706 (2064). **Liability of general and special partners, respectively.**—Such partnerships may consist of one or more persons, who are general partners, and are, jointly and severally, responsible as general partners now are by law; and of one or more persons, who contribute in actual cash payments a specific sum as capital to the common stock, who are called special partners, and who are not liable for the debts of the partnership beyond the funds so contributed to the capital.

1707 (2065). **General partners alone manage the partnership business.**—The general partners alone are authorized to transact business, sign for the partnership, and to bind the same.

1708 (2066). **Proceedings to form limited partnership.** The persons desirous of forming such partnership must make and severally sign a certificate, containing,—

1. The name or firm under which such partnership is to be conducted.
2. The general nature of the business to be transacted.
3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence.
4. The amount of capital which each special partner has contributed to the common stock.
5. The period at which such partnership is to commence and terminate.

1709 (2067). **The certificate must be acknowledged.**—The certificate must be acknowledged by the several partners signing the same, before a judge of the supreme or circuit court, or

judge of probate, who must indorse such acknowledgment and sign the same.

1710 (2068). **Where recorded.**—The certificate and acknowledgment must be filed in the office of the judge of probate of the county in which the principal place of business of such partnership is situated, and must be by such judge recorded in a book kept for that purpose, free to inspection. If the partnership has places of business in different counties, a transcript of the certificate and acknowledgment, certified by the judge of probate in whose office it is filed, must be filed and recorded in the office of the judge of probate of every such county.

1711 (2069). **Affidavit of payment of capital of special partner.**—At the time of filing the original certificate and acknowledgment, an affidavit of one or more of the general partners must also be filed in the same office, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock, have been actually and in good faith paid in cash.

1712 (2070). **Partnership not complete until affidavit filed.** No such partnership shall be deemed to have been formed until such certificate has been made, acknowledged, filed and recorded, nor until the affidavit required by the preceding section has been made and filed.

1713 (2071). **All liable as general partners for false certificate or affidavit.**—If any false statement is made in such certificate or affidavit, all the persons interested in such partnership are liable for all the engagements as general partners.

1714 (2072). **Publication of limited partnership.**—The terms of the partnership must be published immediately after the recording, for six successive weeks, in two papers designated by the judge of probate in whose office the certificate is recorded; and if such publication is not made, the partnership shall be deemed general.

1715 (2073). **Printer's affidavit, when filed, proves publication.**—Affidavits of such publication by the printers of the newspapers in which the same is published may be filed with the judge of probate, and are evidence of the fact.

1716 (2074). **Renewals made as the first partnership was formed.**—Every renewal or continuance of such partnership beyond the time originally fixed for its duration must be certified, acknowledged, recorded, and an affidavit of a general partner made and filed, and notice given by publication, as required for its original formation; and every such partnership which is otherwise renewed or continued must be deemed a general partnership.

1717 (2075). **When limited partnership becomes a general partnership.**—Every alteration which is made in the name of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, must be deemed a dissolution of the partnership; and every such partnership, which is in any manner carried on after such alteration has been made, must be deemed a general partnership, unless renewed as a special partnership according to the provisions of the preceding section.

1718 (2076). **Use of special partner's name makes him a**

general partner.—The business of the partnership must be conducted under a firm, in which the names of the general partners alone are inserted, with the addition of the word "limited;" and if the name of any special partner is used in the firm, with his privity, he shall be deemed a general partner.*

1719 (2077). **The general partner prosecutes and defends suits.**—Suits in relation to the business of the partnership may be brought and conducted by and against the general partner, in the same manner as if there were no special partners.

1720 (2078). **Special partner can only withdraw interest and profits.**—No part of the sum which any special partner has contributed to the capital stock must be withdrawn, or paid to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of such capital; and if, after the payment of such interest, any profits remain to be divided, he may also receive his proportion of such profits.

1721 (2079). **If the capital is thus reduced, he must restore it.**—If it appears that by the payment of interest, or profits, to any special partner, the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the capital without interest.

1722 (2080). **Special partner may examine into, but cannot interfere in management of business.**—A special partner may, from time to time, examine into the state and progress of the partnership concerns; may advise as to their management, and act as attorney at law, but must not transact any other business, nor be employed for that purpose as agent or otherwise; and if he interferes contrary to the provisions of this section, he is deemed a general partner.

1723 (2081). **General partners liable to account as other partners.**—The general partners are liable to account to each other, and to the special partners, for their management of the partnership, both in law and equity, as other partners.

1724 (2082). **Partners guilty of fraud, liable for injury.** Every partner who is guilty of any fraud in the affairs of the partnership is liable, civilly, to the party injured to the extent of the damage.

1725 (2083). **On insolvency, no preference to be given by assignment.**—Every sale, assignment, or transfer of any of the property or effects of such partnership, made by the same when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership; and every judgment suffered, lien, credit, or security given by such partnership under like circumstances, and with the like intent, is void.

1726 (2084). **Assignments by partners also void.**—Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, when insolvent, or in con-

* "With the addition of the word 'limited,'" inserted by joint committee.

templation of insolvency, or after, or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own, or of the partnership, a preference over creditors of the partnership, and any judgment suffered, lien created, or security given by any such partner under the like circumstances, and with the like intent, is void as against the creditors of the partnership.

1727 (2085). **Special partners become general by the commission of such acts.**—Every special partner who violates any provision of the two preceding sections, or who concurs in, or assents to any such violation by the partnership, or by any individual person, is liable as a general partner.

1728 (2086). **Special partners cannot claim as creditors on insolvency.**—In case of the bankruptcy or insolvency of the partnership, no special partner is, under any circumstances, to be allowed to claim as a creditor, until the claims of all the other creditors of the partnership are satisfied.

1729 (2087). **Dissolution only made after three weeks' notice.**—No dissolution of such partnership, by the acts of the parties, must take place before the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution has been filed and recorded in the office of the judge of probate in which the original certificate was recorded, and published once a week for three successive weeks in a newspaper published in each of the counties where the partnership has places of business; and if there is any county in which the partnership has a place of business, in which no newspaper is published, then in a paper published the nearest thereto.

CHAPTER 2.

VOID CONTRACTS.

ARTICLE 1.—The prevention of frauds and perjuries.
2.—Contracts in consideration of not bidding for public lands.
3.—Gambling and wagering contracts.
4.—Contracts made on Sunday.

ARTICLE I.

THE PREVENTION OF FRAUDS AND PERJURIES.

1730 (2120). **Conveyances of personal property in trust for the grantor are void as to creditors.**—All deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such person.

P. & M. Bank v. Borland, 5 Ala. 531; Ticknor v. Wiswall, 9 Ala. 305; Allen v. M. R. R. Co., 11 Ala. 437; Abercrombie v. Bradford, 16 Ala. 560; Shackelford v. P. & M. Bank, 22 Ala. 238; Lanier v. Driver, 24 Ala. 149; Millard v. Hall, Ib. 209; Montgomery v. Kirksey, 26 Ala. 172; Wiley v. Knight, 27 Ala. 336; Constantine v. Twelves, 29 Ala. 607; Reynolds v. Crook, 31 Ala. 634; Miller v. Stetson, 32 Ala. 161; King v. Kenan, 38 Ala. 63; Mayer v. Clark, 40 Ala. 259; Moog v. Benedicks, 49 Ala. 512; Sandlin v. Robbins, 62 Ala. 477; Seaman v. Nolen, 68

Ala. 463; Sims v. Gaines, 64 Ala. 392; Perry Ins. Co v. Foster, 58 Ala. 502; Commercial Bank v. Brewer, 71 Ala. 574; Benedict v. Renfro, 75 Ala. 121; Rankin v. Vandiver, 78 Ala. 562; Renfro v. Goetter, Ib. 311.

1731. Mortgage of personal property.—A mortgage of personal property is not valid, unless made in writing and subscribed by the mortgagor. Jan. 22, 1885, p. 93.

1732 (2121). **Certain contracts to be in writing, else void.** In the following cases, every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing:

1. Every agreement which, by its terms, is not to be performed within one year from the making thereof.

2. Every special promise by an executor or administrator to answer damages out of his own estate.

3. Every special promise to answer for the debt, default, or miscarriage of another.

4. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

5. Every contract for the sale of lands, tenements, or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase-money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller.

Contracts not void, but voidable merely.—Gillespie v. Battle, 15 Ala. 276; Flinn v. Barber, 64 Ala. 193; Cooper v. Hornsby, 71 Ala. 62; Gordon v. Tweedy, 71 Ala. 202; Comer v. Sheehan, 74 Ala. 452; Shakspeare v. Alba, 76 Ala. 351. "**Some note, or memorandum thereof.**"—Adams v. McMillan, 7 Port. 73; Hutton v. Williams, 35 Ala. 503; Benziger v. Miller, 50 Ala. 206; Carter v. Shorter, 57 Ala. 253; Jenkins v Harrison, 66 Ala. 345; Harrison v. Parmer, 76 Ala. 157. "**Expressing the consideration.**"—Rigby v. Norwood, 34 Ala. 129; McQuaid v. Powers, 46 Ala. 44; Bolling v. Munchus, 65 Ala. 558; Dunbar v. Smith, 66 Ala. 490; Moog v. Strang, 69 Ala. 98; Lehman v. Levy, Ib. 48; Phillips v. Adams, 70 Ala. 373; Jenkins v. Harrison, 66 Ala. 345; Carter v. Shorter, 57 Ala. 253; Foster v. Napier, 74 Ala. 393; Horton v. Wollner, 71 Ala. 452; Smith v. Freeman, 75 Ala. 285. "**Subscribed by the party,**" **etc.**—Norman v. Molett, 8 Ala. 548; Knox v. King, 36 Ala. 367; Heflin v. Milton, 69 Ala. 354; Chambers v. Ala. Iron Co., 67 Ala. 353. **The statute avoids executory, not executed contracts.**—Rake v. Pope, 7 Ala. 161; Rhodes v. Storr, Ib. 346; Gafford v. Stearns, 51 Ala. 434; Lavender v. Hall, 60 Ala. 214; Gordon v. Tweedy, 71 Ala. 202. **Neither complaint nor bill need show contract to be in writing.**—Kizer v. Locke, 9 Ala. 269; Perrine v. Leachman, 10 Ala. 140; Robinson v. Tipton, 31 Ala. 595; Ritch v. Thornton, 65 Ala. 309; Rose v. Gibson, 71 Ala. 41. **Must be specially pleaded in defense.**—Patterson v. Ware, 10 Ala. 444; Bailey v. Irwin, 72 Ala. 505; Gordon v. Tweedy, 71 Ala. 204; Ritch v. Thornton, 65 Ala. 309; Shakespeare v. Alba, 76 Ala. 351; Martin v. Blanchett, 77 Ala. 288; Brigham v. Carlisle, 78 Ala. 243. **In equity the defense may be interposed by demurrer.**—Bolling v. Munchus, 65 Ala. 558; Phillips v. Adams, 70 Ala. 373. **Stranger cannot take advantage of the statute.**—Gafford v. Stearns, 51 Ala. 434; Lavender v. Hall, 60 Ala. 214; Cooper v. Hornsby, 71 Ala. 62; Gordon v. Tweedy, Ib. 202; Comer v. Sheehan, 74 Ala. 452; Shakespeare v. Alba, 76 Ala. 351. **When parties estopped from pleading statute.**—Friestone v. Friestone, 49 Ala. 128; Meyer v. Mitchell, 75 Ala. 475. **Agreements to be performed within one year. What within.**—Crommelin v. Thiess, 31 Ala. 412; Scoggin v. Blackwell, 36 Ala. 351; Parker v. Hollis, 50 Ala. 411; Dickson v. Frisbee, 52 Ala. 165; Treadway v. Smith, 56 Ala. 345; Horton v. Wollner, 71 Ala. 452; Martin v. Blanchett, 77 Ala. 288. **What not within.**—Adams v. Adams, 26 Ala. 272; Derrick v. Brown, 66 Ala. 162; Heflin v. Milton, 69 Ala. 354; Singer Manf'g Co. v. Sayre, 75 Ala. 270; Shakespeare v. Alba, 76 Ala. 351. **Special promise by an executor, etc.**—Hester v. Wesson, 6 Ala. 415; Martin v. Black, 20 Ala. 309; Starke v. Wilson, 65 Ala. 576. **Special promise to answer for debt, etc., of another. What within.**—Jordan v. Garnett, 3 Ala. 610; Milton v. DeYampert, Ib. 648; Martin v. Black, 20 Ala. 309; s. c. 21 Ala. 721; Hollingsworth v. Martin, 23 Ala 591; Rigby v. Norwood, 34 Ala. 129; Boykin v. Dohlonde, 37 Ala. 577; Sharman v. Jackson, 47 Ala. 329; Bullard v. Jones, 50 Ala. 382; Dunbar v. Smith, 66 Ala. 490; Foster v. Napier, 74 Ala. 393; Westmoreland v. Porter, 75 Ala. 452; Trammell v. Hudmon, 78 Ala. 222. **What**

not within.—Click v. McAfee, 7 Port. 62; McKenzie v. Jackson, 4 Ala. 230; Bates v. Starr, 6 Ala. 697; Brown v. Barnes, Ib. 604; Faires v. Lodanc, 10 Ala. 50; Cameron v. Clark, 11 Ala. 259; Merrill v. Smith, 12 Ala 569; Oliver v. Hire, 14 Ala. 590; Files v. McLeod, Ib. 611; Blount v. Hawkins, 19 Ala. 100; Scott v. Myatt, 24 Ala. 489; Jolley v. Walker, 26 Ala. 690; Sanford v. Howard, 29 Ala. 684; Mason v. Hall, 30 Ala. 599; Ledlow v. Becton, 36 Ala. 596; Ragland v. Wynn, 37 Ala. 32; Rutledge v. Townsend, 38 Ala. 706; McQuaid v. Powers, 46 Ala. 44; Marx v. Bell, 48 Ala. 497; Davidson v. Rothschild, 49 Ala. 104; Carpenter v. Murphree, Ib. 84; Wells v. Thompson, 50 Ala. 83; Boswell v. Carlisle, 55 Ala. 554; Graves v. Shulman, 59 Ala. 406; Lock v. Humphries, 60 Ala. 117; Underwood v. Lovelace, 61 Ala. 155; Dunbar v. Smith, 66 Ala. 490; Lehman v. Levy, 69 Ala. 48; Moog v. Strang, Ib. 98; Madden v. Floyd, Ib. 221; Thornton v. Williams, 71 Ala. 555; Thornton v. Guice, 73 Ala. 321; Carlisle v. Campbell, 76 Ala. 247. **The promise must not only be in writing, but also founded on a valuable consideration.**—Files v. McLeod, 14 Ala. 611; Thompson v. Hall, 16 Ala. 204; Beall v. Ridgeway, 18 Ala. 117; Rutledge v. Townsend, 38 Ala. 192; Watson v. Reynolds, 54 Ala. 191; Underwood v. Lovelace, 61 Ala. 155; Bolling v. Munchus, 65 Ala. 558. **Contract for the sale of lands, etc. What within.**—Agee v Steele, 8 Ala. 948; Riddle v. Brown, 20 Ala. 412; Chambliss v. Smith, 30 Ala. 366; Hutton v. Williams, 35 Ala. 503; Martin v. Wharton, 38 Ala. 637, Carroll v. Powell, 48 Ala. 298; Parker v. Hollis, 50 Ala. 411; Hughes v. Hatchett, 55 Ala 539; Sanders v. Robertson, 57 Ala. 465; Carter v. Shorter, Ib. 253; Patton v. Beecher, 62 Ala. 579; Lehman v. Collins, 69 Ala. 127; Heflin v. Milton, Ib. 354; Phillips v. Adams, 70 Ala. 373; Rose v. Gibson, 71 Ala. 35; Whaley v. Whaley, Ib. 59; Junkins v. Lovelace, 72 Ala. 303; Stringfellow v. Ivie, 73 Ala. 209. **What not within.**—Holman v. Bank, 12 Ala. 370; Scoggins v. Slater, 22 Ala. 689; Danforth v. Laney, 28 Ala 274; Rhodes v. Otis, 33 Ala. 578; Arrington v. Porter, 47 Ala. 714; Gafford v. Stearns, 51 Ala. 434; Burkham v. Mastin, 54 Ala. 122; Harris v. Powers, 57 Ala. 139; Jenkins v. Harrison, 66 Ala. 345. **Partial performance as affecting contract.**—Brewer v. Brewer, 19 Ala. 481; Chambliss v. Smith, 30 Ala. 366; Hart v. McClellan, 41 Ala. 251; White v. Smith, 51 Ala. 495; Heflin v. Bingham, 56 Ala. 566; Heflin v. Milton, 69 Ala. 354; Pike v. Pettus, 71 Ala. 98; Jenkins v. Lovelace, 72 Ala. 303; Shakespeare v. Alba, 76 Ala. 351; Martin v. Blanchett, 77 Ala. 288. **Specific performance by party who did not sign.**—Chambers v. Ala. Iron Co., 67 Ala. 353; Heflin v. Milton, 69 Ala. 354. **When parol trusts within.**—Patton v. Beecher, 64 Ala 579; Rose v. Gibson, 71 Ala. 35; Whaley v. Whaley, Ib. 159; Stringfellow v. Ivie, 73 Ala. 209.

1733 (2122). **Auctioneer's written memorandum sufficient.** When lands, tenements, or hereditaments are sold or leased at public auction, and the auctioneer, his clerk, or agent, makes a memorandum of the property, and price thereof at which it is sold or leased, the terms of sale, the name of the purchaser, or lessee, and the name of the person on whose account the sale or lease is made, such memorandum is a note of the contract, within the meaning of the preceding section.

Adams v. McMillan, 7 Port. 73; Hutton v Williams, 35 Ala. 503; Knox v. King, 36 Ala. 367; Carroll v. Powell, 48 Ala. 298; Lewis v. Wells, 50 Ala. 198.

1734 (2123). **Representation of another's credit to be in writing, or else not actionable.**—No action can be maintained to charge any person, by reason of any representation or assurance made, concerning the character, conduct, ability, trade, or dealings of any other person, when such action is brought by the person to whom such representation or assurance was made, unless the same is in writing, signed by the party sought to be charged.

1735 (2124). **All instruments made to hinder, delay, or defraud creditors, void as to creditors.**—All conveyances, or assignments in writing, or otherwise, of any estate or interest in real or personal property, and every charge upon the same, made with intent to hinder, delay, or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts or demands; and every bond, or other evidence of debt, given, suit commenced, decree or judgment suffered, with the like intent, against the persons who are or may be so hin-

dered, delayed or defrauded, their heirs, personal representatives and assigns, are void.

Creditors entitled to benefits of statute.—Crawford v. Kirksey, 50 Ala. 591; Bibb v. Freeman, 59 Ala. 612; King v. King, 61 Ala. 479; Donley v. McKiernan, 62 Ala. 34; Pickett v. Pipkin, 64 Ala. 520; Anderson v. Anderson, Ib. 403; Fearn v. Ward, 65 Ala. 33; Jenkins v. Lockard, 66 Ala. 377; Houston v. Blackman, 66 Ala., 559; Keel v. Larkin, 72 Ala. 493; Zelnicker v. Bingham, 74 Ala. 598. **Voluntary conveyances within the statute.**—Stokes v. Jones, 21 Ala. 731; Randall v. Lang, 23 Ala. 751; Stiles v. Lightfoot, 26 Ala. 443; Huggins v. Perrine, 30 Ala. 396; Cole v. Garner, 31 Ala 244; Williams v. Avery, 38 Ala. 115; Spencer v. Godwin, 30 Ala. 355; Leonard v. Forcheimer, 49 Ala. 145; Davidson v. Lanier, 51 Ala. 318; Bibb v. Freeman, 59 Ala. 612; McAnally v. O'Neill, 56 Ala. 299; Kirksey v. Snedicor, 60 Ala. 192; Anderson v. Anderson, 64 Ala. 403; Fearn v. Ward, 65 Ala. 33; Fellows v. Lewis, 65 Ala. 343; Jenkins v. Lockhard, 66 Ala. 377; Early v. Owens, 68 Ala. 171; Seals v. Robinson, 75 Ala. 364; Caldwell v. King, 76 Ala. 149. **Of what fraud attacking creditor may avail himself.**—Henry v. Murphy, 54 Ala. 247. **Badges of fraud.**—Borland v. Mayo, 8 Ala. 105; Terrell v. Green, 11 Ala. 213; Harkins v. Bailey, 48 Ala. 376; Marshall v. Croom, 52 Ala. 554; Tompkins v. Nichols, 53 Ala. 197; Harrell v. Mitchell, 61 Ala. 270; Shealy v. Edwards, 75 Ala. 411; Meyer v. Sulzbacher, 76 Ala. 120. **A fraudulent intent on the part of debtor, participated in on part of purchaser, necessary to invalidate conveyance.**—Borland v. Mayo, 8 Ala. 104; Ala. Life Ins. Co. v. Pettway, 24 Ala. 544; Anderson v. Hooks, 9 Ala. 704; Hall v. Heydon, 41 Ala. 242; Marshall v. Croom, 52 Ala. 554; s. c., 60 Ala. 121; Tompkins v. Nichols, 53 Ala. 197; Crawford v. Kirksey, 55 Ala. 282; Coleman v. Smith, Ib. 368; McWilliams v. Rodgers, 56 Ala. 87; Florence S. M. Co. v. Zeigler, 58 Ala. 221; Bradley v. Ragsdale, 64 Ala. 558; Pickett v. Pipkin, Ib. 520; Lienkauf v Morris, 66 Ala. 406; Cromelin v. McCauley, 67 Ala. 542; Warren v. Burch, 68 Ala. 449; Lehman v. Kelly, 68 Ala. 192; Gordon v. Tweedy, 71 Ala. 202; Kiser v. Gamble, 75 Ala. 386; Shealy v. Edwards, Ib. 411; s. c., 78 Ala. 176; Benedict v. Renfro, 75 Ala. 121; Meyer v. Sulzbacher, 76 Ala. 120; Hodges v. Coleman, Ib. 103. See also Reynolds v. Welch, 47 Ala. 201. **Sales to creditors in payment of debts; preferences.**—Young v. Dumas, 39 Ala. 60; Crawford v. Kirksey, 50 Ala. 590, s. c., 55 Ala. 282; Eskridge v. Abrahams, 61 Ala. 134; Warren v. Jones, 68 Ala. 449; Lehman v. Kelly, Ib 192; Lynne v. Wann, 72 Ala. 43; Shealy v. Edwards, 75 Ala. 411; Hodges v. Coleman, 76 Ala. 103; Meyer v. Sulzbacher, 76 Ala. 120; Rankin v. Vandiver, 78 Ala. 562. "**Fraudulent intent supersedes whole inquiry into the consideration.**"—Bryant v. Young, 21 Ala. 264. **Character of fraud for relief against judgment or decree.**—Cromelin v. McCauley, 67 Ala. 542. **Conveyance, absolute on its face, but intended as an indemnity or security, fraudulent.**—Bryant v Young, 21 Ala 264; Hartshorn v Williams, 31 Ala. 149; Sims v. Gaines, 64 Ala. 392; Danner v. Stonewall Ins. Co., 77 Ala. 184; Proskauer v. Savings Bank, Ib. 257. **That effect of transaction is to hinder or delay creditors, without fraudulent intent, insufficient.**—Shealy v. Edwards, 75 Ala 411; Young v. Dumas, 39 Ala. 60. **Conveyances of property exempt not within the statute.**—Fellows v. Lewis, 65 Ala. 343; Lehman v. Bryan, 67 Ala. 558; Wright v. Smith, 66 Ala. 514; Alley v. Daniel, 75 Ala. 403. **Conveyances valid inter partes.**—Pond v. Wadsworth, 24 Ala. 531; Walton v. Bonham, Ib., 513; Wiley v. Knight, 27 Ala. 336; Strange v Graham, 56 Ala. 614; Pickett v. Pipkin, 64 Ala. 520; Williams v. Higgins, 69 Ala. 518; Shealy v. Edwards, 75 Ala. 412.

1736 (2125). **Mortgage void as to creditors, if the grantor reserve a benefit.**—Every deed of trust, mortgage, or other security, made to secure any pre-existing debt, whether such debt is due or not, or absolute, or conditional, is fraudulent and void, as to the creditors of the grantor, when any creditor provided for thereby is required to make any release, or to do any other act impairing his existing rights, before participating in, or receiving the securities therein provided for him.

Henry v. Murphy, 54 Ala. 246.

1737 (2126). **When general assignments enure equally to the benefit of all creditors.**—Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and enure to the benefit of all the creditors of the grantor equally; but this section shall not apply to, or embrace mortgages given to secure a debt contracted contempo- **As amended, Feb. 23, 1883, p. 189.**

raneously with the execution of the mortgage, and for the security of which the mortgage was given.

Holt v. Bancroft, 30 Ala. 193; Price v. Mazange, 31 Ala. 701; Warren v. Lee, 32 Ala. 440; Stetson v. Miller, 36 Ala. 642; Longmire v. Goode, 38 Ala. 577; Harkins v. Bailey, 48 Ala. 376; Murphy v. Caldwell, 50 Ala. 461; DuBose v. Carlisle, 51 Ala. 590; Crawford v. Kirksey, 55 Ala. 282; Perry Ins. Co. v. Foster, 58 Ala. 502; In re Tallassee Mfg. Co., 64 Ala. 568; Shirley v. Teal, 67 Ala. 449; Bromberg v. Heyer, 69 Ala. 22; s. c., 74 Ala. 524; Danner v. Brewer, 69 Ala. 191; Commercial Bank v. Brewer, 71 Ala. 574; Otis v. Maguire, 76 Ala. 295; Watts v. Eufaula Nat. Bank, Ib. 474.

ARTICLE II.

CONTRACTS IN CONSIDERATION OF NOT BIDDING FOR PUBLIC LANDS.

1738 (2127). **Agreement not to bid, unlawful.**—No person must, directly or indirectly, receive any money or thing of value, in consideration of not bidding at any sale of public lands within this state.

1739 (2128). **No public land to be bid off under a contract to resell.**—No person must bid off any of the public lands within this state, under an agreement, previously made, to transfer the same, or any part thereof, or interest therein, for a premium or advance to be paid therefor.

1740 (2129). **Such contracts void; penalty for making them.**—All contracts in violation of the provisions of the two preceding sections are void; and any person violating such provisions forfeits double the amount of money or value of the thing received, or agreed to be received; one-half to the use of the person suing for the same, and the other to the state.

1741 (2130). **Improvements on such lands may be sold.** Nothing in the preceding sections of this article must be so construed as to prevent any person who has made improvements on public lands from selling the same, and receiving the purchase-money therefor.

ARTICLE III.

GAMBLING AND WAGERING CONTRACTS.

1742 (2131). **Gambling contracts void, and money paid may be recovered.**—All contracts founded, in whole or in part, on a gambling consideration, are void; and any person who has paid any money, or delivered any thing of value, lost upon any game or wager, may recover such money, thing, or its value, by action commenced within six months from the time of such payment or delivery.

Davis v. Orme, 36 Ala. 540; Harris v. Brooks, 56 Ala. 388; Lewis v. Bruton, 74 Ala. 316; Hawley v. Bibb, 69 Ala. 52; Helmetag v. Miller, 76 Ala. 183.

1743 (2132). **Any person may recover money so paid for the use of the wife or child of the loser.**—Any other person may also recover the amount of such money, thing, or its value, by action commenced within twelve months after the payment or delivery thereof, for the use of the wife, or if no wife, the child or children, and if no child or children, the next of kin of the loser.

Davis v. Orme, 36 Ala. 540.

1744 (2133). **One judgment bars other suits for the same cause.**—A judgment under either of the two preceding sections for the amount of money paid, thing delivered, or its value, is a good defense to any action brought for such money, thing, or its value, under the provisions of the other section.

1745 (2134). **The winner may be garnished by a creditor.** Any creditor of such losing party may, at any time within two years from the payment of such money, or delivery of such thing, garnish the winner as other debtors are garnished upon attachments, or upon judgments; and if such garnishee fail to appear, judgment may be rendered against him as against other garnishees failing to answer; the answer of the garnishee shall not be evidence against him in a criminal prosecution.

1746 (2135). **Garnishment bars another suit.**—A judgment recovered by a creditor under the provisions of the preceding section, is a defense to any action brought by any person under the provisions of the first two sections of this article.

1747 (2136). **A prior judgment bars the garnishment.**—In like manner, a judgment recovered under the provisions of the first two sections of this article is a defense to any proceeding on any garnishment served after the recovery of such judgment; and the court may make any order staying proceedings as may be necessary to protect the rights of the defendant.

1748 (2137). **The answers of the parties do not subject them to prosecution.**—In any action brought under the provisions of this article, either party may be examined on interrogatories as in other cases; but the answer of the party cannot be used against him in any criminal prosecution.

ARTICLE IV.

CONTRACTS MADE ON SUNDAY.

1749 (2138). **Such contracts void except in case of necessity, or for works of charity.**—All contracts made on Sunday, unless for the advancement of religion, or in the execution, or for the performance of some work of charity, or in case of necessity, are void.

O'Donnell v. Sweeney, 5 Ala. 467; Shippey v. Eastwood, 9 Ala. 198; Dodson v. Harris, 10 Ala. 566; Butler v. Lee, 11 Ala 885; Saltmarsh v. Tuthill, 13 Ala. 390; Aldridge v. Branch Bank, 17 Ala. 45; Rainey v. Capps, 22 Ala. 288; Hooper v. Edwards, 18 Ala. 280; s. c., 25 Ala. 528; Hussey v. Roquemore, 27 Ala. 282; Flanagan v. Meyer, 41 Ala. 132; Hammons v. State, 59 Ala. 164; Burns v. Moore, 76 Ala. 339; Tamplin v. Still, 77 Ala. 374.

CHAPTER 3.

INTEREST.

1750 (2088). **Rate of interest fixed at eight per cent.**—The rate of interest upon the loan or forbearance of money, goods, or things in action, is eight dollars upon one hundred dollars for one year; and at that rate for a greater or less sum, or a longer or shorter time.

1751 (2089). **Interest accrues on breach of contract.**—All contracts, express or implied, for the payment of money, or other thing, or for the performance of any act or duty, bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed.

Generally.—Interest is compensation for the withholding of the principal, and when the principal is ascertained to be due, at a particular period, interest follows as an incident.—James v. Governor, 1 Ala. 605; Boyd v. Gilchrist, 15 Ala. 849; Whitworth v. Hart, 22 Ala. 343; Cheek v. Waldrum, 25 Ala. 152; Hollingsworth v. Hammond, 30 Ala. 668; State v. Lott, 69 Ala. 147. Courts of chancery allow interest whenever it would be recoverable at law.—Crocker v. Clements, 23 Ala. 296; Godwin v. McGehee, 19 Ala. 468; Tarleton v. Goldthwaite, 23 Ala., 346 On a contract payable in specific property, or for the delivery of specific property, interest on the value of the property is computed from the day it ought to have been delivered.—Clay v. Neal, 48 Ala. 252. Liability of factor or commission merchant for interest on balance due customer.—Tyree v. Parham, 66 Ala. 424. Interest allowed on breach of warranty of slave.—Rowland v. Shelton, 25 Ala. 217; Stoudenmire v. Williamson, 29 Ala. 558. But not in statutory action to recover damages for trespass by cattle.—Jean v. Sandiford. 39 Ala. 317. Nor in action of trespass quare clausum fregit —Glidden v. Street, 68 Ala. 600. **Accounts.**—Marr v. Southwick, 2 Port. 351; Moore v. Patton, Ib. 451; Waring v. Henry, 30 Ala. 721; Shields v. Henry, 31 Ala. 53. **Bills, notes, bonds.**—Vaughn v. Goode, Minor, 417; Maxey v. Knight, 18 Ala. 300; Moore v. Davidson, 18 Ala. 209; Billingsley v. Billingsley, 24 Ala. 518; Hunt v. Hall, 37 Ala. 702. See, also, Sanders v. Rives, 3 Stew. 109; Crawford v. Simonton, 7 Port. 111; Ijams v. Rice, 17 Ala. 404; Kyle v. Mays, 22 Ala. 692.

1752 (2090). **Interest on judgments.**—Judgments and decrees for the payment of money, other than costs, bear interest from the day of rendition.

1753 (2091). **Partial payments applied to interest.**—When partial payments are made, the interest due is first to be paid, and the balance applied to the payment of the principal.

Handley v. Dobson, 7 Ala. 359; Coleman v. Smith, 55 Ala. 368; Vaughan v. Smith 69 Ala. 92; Milhous v. Dunham, 78 Ala. 48.

1754 (2092). **Interest on usurious contracts.**—All contracts for the payment of interest upon the loan or forbearance of goods, money, things in action, or upon any contract whatever, at a higher rate than is prescribed in this chapter, are usurious and cannot be enforced, except as to the principal; and if any interest has been paid, the same must be deducted from the principal, and judgment rendered for the balance only.

Thompson v. Jones, 1 Stew. 556; Wright v. Elliott, Ib. 391; Ellis v. Bibb, 2 Stew. 63; Wright v. Minter, Ib. 453; Wright v. McAlexander, 11 Ala. 236; Jones v. Jackson, 14 Ala. 186; Carlisle v. Hill, 16 Ala. 398; Jackson v. Jones, 13 Ala. 121; Saltmarsh v. P. & M. Bank, 14 Ala. 668; s. c., 17 Ala. 761; Brown v. Harrison, 17 Ala. 774; Swilley v. Lyon, 18 Ala. 552; Matlock v. Mallory, 19 Ala. 694; Gray v. Brown, 22 Ala. 262; Eslava v. Lepretre, 21 Ala. 504; Hunt v. Acree, 28 Ala. 580; Miller v. Bates, 35 Ala. 580; Neel v. Clay, 48 Ala. 252; Barr v. Collier, 54 Ala. 39; King v. Perry Ins. Co., 57 Ala. 118; Eslava v. Crampton, 61 Ala. 507; Collier v. Barr, 64 Ala. 543; Uhfelder v. Carter, Ib. 527; Linn v. Munter, 61 Ala. 492; Bradford v. Daniel, 65 Ala. 133; Masterson v. Grubbs, 70 Ala. 406; Burns v. Campbell, 71 Ala. 271.

1755 (2093). **Interest at one hundred per cent. on notes and change bills of one dollar or less.**—All change bills and notes for a sum not exceeding one dollar, issued or circulated in this state without authority of law, bear interest at the rate of one hundred per cent. per annum, from the day of their date, or time of issue, or circulation; and may be sued by the holder thereof, without regard to the person to whom the same are payable, and a recovery had against the person issuing or giving circulation to the same.

CHAPTER 4.

CHOSES IN ACTION.

1756 (2094). **What are negotiable instruments.**—Promissory notes payable in money at a bank or private banking-house, or a certain place of payment therein designated, and bills of exchange are governed by the commercial law.

Cook v. Mutual Ins. Co., 53 Ala. 37; Bank v. Brown, 48 Ala. 108.

1757 (2095). **Other instruments also, as to grace, protest and notice.**—All other instruments payable in money, at a bank or private banking-house, or a certain place of payment therein designated, are governeed by the commercial law, as to days of grace, protest and notice.

1758 (2096). **No grace allowed on other contracts.**—No days of grace are allowed on any contracts, except those enumerated in the two preceding sections.

1759 (2097). **Holidays; paper due on holiday.**—Sunday, Christmas-day, the first day of January, the twenty-second day of February, the fourth day of July, the day designated by the proclamation of the governor for public thanksgiving, shall each be deemed a holiday. If Christmas-day, or the first day of January, or the twenty-second day of February, or the fourth day July falls on Sunday, the Monday following is a holiday. If any paper entitled to days of grace, by the allowance thereof, or subject to protest, becomes due on a holiday, it must be taken as due on the next succeeding business day. Feb. 23, 1883, p. 188.

1760 (2118). **Inland and foreign bills defined.**—All bills drawn and payable within this state are inland bills, and those drawn in this state and payable elsewhere, are foreign bills, within the meaning of this chapter.

Todd v. Neal, 49 Ala. 266.

1761 (2098). **Paper not designating a certain payee, or payable to a fictitious person.**—All bonds, bills, or notes, except those issued to circulate as money, payable to anything or bearer, to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved; if payable to an existing person or bearer, must be construed as if payable to such person or order.

Clark v Field, 1 Ala. 468; Kemper v. Schieflin, 5 Ala. 473; Sawyer v. Patterson, 11 Ala. 523; Blackman v. Lehman, 63 Ala 547.

1762 (2099). **Contracts in writing assignable by indorsement.**—All bonds, contracts and writings for the payment of money or other thing, or the performance of any act or duty, are assignable by indorsement so as to authorize an action thereon by each successive indorsee.

Adkins v. Allen, 1 Stew. 130; Sartin v. Weir, 3 Stew. & Port. 421; Spence v. Whitaker, 3 Port. 297; Payne v. Mayor, 4 Ala. 333; Bunnell v. Magee, 9 Ala. 433; Brown v. Chambers, 12 Ala. 697; Nave v. Berry, 22 Ala. 382; Perry v. Merchants' Ins Co., 25 Ala. 355; Skinner v. Bedell, 32 Ala. 44; Henley v. Bush, 33 Ala. 636; Phillips v. Sellers, 42 Ala. 658; Lehman v. Marshall, 47 Ala. 362; Flexner v. Dickerson, 65 Ala. 72; Allen v. Maury, 66 Ala. 10; Lovins v. Humphries, 67 Ala. 437.

1763 (2119). **Claims against railroad companies assignable.**—Claims against railroad companies, for injuries to property, may be assigned in writing, and each successive assignee thereof may sue thereon in his own name.

Feb. 13, 1879, p 171.

1764. Effect of transfer of note given for purchase-money of lands.—The transfer of a bond, bill, or note, given for the purchase-money of lands, whether the transfer be by delivery merely, or in writing, expressed to be with or without recourse on the transferor, passes to the transferee the lien of the vendor on the lands.

1765 (2100). **Set-off, etc., against the payee good until notice.**—All contracts and writings, except such as are governed by the commercial law, and paper issued to circulate as money, are subject to all payments, sets-off and discounts had or possessed against the same previous to notice of the assignment or transfer.

Stockings v. Toulmin, 3 Stew. & Port. 35; Kennedy v. Manship, 1 Ala. 43; Wray v. Furniss, 27 Ala. 471; Carroll v. Malone, 28 Ala. 521; McKenzie v. Hunt, 32 Ala. 494; President v. Poelnitz, 61 Ala. 147.

1766 (2101). **Acceptance to be written.**—No person within this state must be charged as the acceptor of a bill of exchange, unless his acceptance is in writing, signed by himself or agent.

Sands v. Mathews, 27 Ala, 399; Smith v. Ledyard, 49 Ala. 279; Auerbach v. Pritchett, 58 Ala. 451; Whilden v. M. & P. Bank, 64 Ala. 1.

1767 (2102). **Written promise to accept.**—An unconditional promise, in writing, to accept a bill before it is drawn, amounts to an actual acceptance.

1768 (2103). **Bills to be accepted on the paper.**—Every holder of a bill, presenting the same for acceptance, may require that the acceptance be written on the bill; and a refusal so to do is a refusal to accept, and the bill may be protested for non-acceptance.

1769 (2104). **Damages for breach of promise to accept a bill.**—The last three sections must not be construed to impair the right of any person to whom a promise to accept a bill has been made, and who, on the faith of such promise, has negotiated the bill, to recover damages of the person making such promise, on his refusal to accept such bill.

Whilden v. P. & M. Bank, 64 Ala. 1.

1770 (2105). **Refusal to return bill within twenty-four hours is an acceptance.**—Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who refuses, within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or non-accepted, to the holder, must be deemed to have accepted the same.

1771 (2106). **Damages on protested bills.**—The damages on bills of exchange, inland or foreign, protested for non-acceptance or non-payment, are five per cent. on the sum drawn for.

Leigh v. Lightfoot, 11 Ala. 935; McKenzie v. Clanton, 33 Ala. 528; Knott v. Venable, 42 Ala. 186; Trammell v. Hudmon, 56 Ala. 235.

1772 (2107). **Damages include all charges except interest and protest fees.**—Damages on protest for non-payment are in the place of all charges except costs of protest incurred previous to, and at the time of giving notice of non-payment; but

the holder may recover legal interest upon the aggregate amount of the principal sum specified in such bill, and of the damages thereon, from the time at which payment of the principal sum has been demanded, and costs of protest.

1773 (2108). **When bill is payable in our currency, damages cover the exchange.**—If the amount in such bill specified is expressed in money of the United States, the amount due thereon, and of the damages herein allowed for the non-payment thereof, must be ascertained without reference to the rate of exchange between this state and the place on which such bill was drawn, at the time of the demand of payment or notice of non-payment.

1774 (2109). **When payable in foreign currency, the exchange is added.**—If the amount in such bill specified is expressed in the money or currency of any foreign country, then the amount due, exclusive of the damages payable thereon, must be ascertained and determined by the rate of exchange, or the value of such foreign currency, at the time of the demand of payment.

1775 (2110). **Damages and charges on protest for non-acceptance.**—When a bill of exchange is protested for non-acceptance, the same rate of damages is allowed as in the case of a protest for non-payment; and such damages are in the place of all charges, except costs of protest, incurred previous to, and at the time of giving notice of non-acceptance; but the holder is entitled to recover legal interest, exclusive of the damages, upon the amount of the principal sum, from the time when the same would have become payable, if accepted, interest on the damages from the demand of acceptance, and costs of protest.

1776 (2111). **Notice of protest; where sent, etc.**—In all cases where notice of the non-acceptance of a bill of exchange, or non-payment of a bill of exchange, promissory note, or other negotiable instrument, is given by sending the same by mail, it is sufficient if such notice is directed to the place where the person sought to be charged by such notice resided at the time of drawing, making, or indorsing such bill, note, or negotiable instrument; or to the post-office nearest his residence at that time, unless, at the time of affixing his signature to such bill, note, or instrument, he specifies thereon the post-office to which he requires the notice to be addressed.

John v. City Nat. Bank, 57 Ala. 96.

1777. Personal notice not necessary.—If the party to be charged reside at the place of protest, and it be a town or city having ten thousand or more inhabitants, or in which there is a free postal delivery of the mail, notice of protest may be given through the mail, the postage being prepaid. Dec. 10, 1878, p. 172.

1778 (2112, 2113). **Mode of charging indorser or assignor on non-negotiable paper.** — On all contracts assigned by writing, which are not governed by the commercial law, when the amount due exceeds one hundred dollars, to charge the indorser or assignor, suit must be brought against the maker to the first court to which suit can properly be brought after making the indorsement or assignment. If the amount due does not exceed one hundred dollars, suit must be brought

against the maker within thirty days after suit can properly be brought. In either case, if judgment is obtained, execution must be issued as authorized by law, and the inability of the maker to pay such judgment proved by the return of "no property."

Roberts v. Kilpatrick, 5 Stew. & Port. 96; Woodcock v. Campbell, 2 Port. 456; Ivey v. Sanderson, 6 Port. 420; Bristow v. Jones, 1 Ala. 159; Rathbone v. Bradford, Ib. 312; Riddle v. Rourke, Ib. 394; Woodward v. Harbin, Ib. 104; s. c., 4 Ala. 534; Pearson v. Mitchell, 2 Ala. 736; Reese v. White, Ib. 306; Holt v. Moore, 4 Ala. 394; Bates v. Ryland, 6 Ala. 668; Miller v. McIntyre, 9 Ala. 638; Kain v. Walke, 12 Ala. 184; Weed v. Brown, 13 Ala 449; Schaefer v. Adler, 14 Ala. 723; Bradford v. Bishop, Ib. 517; s. c , 16 Ala. 769; Fulford v. Johnson, 15 Ala. 385; Brown v Johnson, 42 Ala. 208; Hays v. Myrick, 47 Ala. 355; Sugg v. Winston, 49 Ala 586; Walker v. Wigginton, 50 Ala. 579; Bradley v. Patton, 51 Ala. 108.

1779 (2114). **Suit may be waived by written consent.** The time for bringing the suit, as required by the preceding section, may be extended or waived by the consent of the indorser or assignor in writing signed by him.

Bates v. Ryland, 6 Ala. 668; Litchfield v. Allen, 7 Ala. 779; Foster v. Stafford, 14 Ala. 714; Lodor v. Gayle, 29 Ala. 412; Thomason v. Cooper, 57 Ala. 560.

1780 (2115). **Excuse for not suing, obtaining judgment, etc.**—The holder of such indorsed or assigned contract is excused from bringing the suit, obtaining the judgment and issuing the execution thereon,—.

1. When the maker has no known place of residence in the state.

2. When by use of ordinary diligence such residence cannot be ascertained.

3. When a suit has been commenced in the county of the residence of the maker, and a summons to the first and next succeeding court returned not found by the proper officer.

4. When a judgment against the maker has been defeated, in whole or in part, by a defense to the merits of such contract or writing, or a set-off against any other than the indorsee or assignee.

5. When any defense, except a set-off to the merits of such contract or writing, exists, which would prevent a judgment for all or any portion of the sum due, or the value of the thing payable by such contract or writing.

6. When the maker dies before the time expires for bringing suit, or, if after suit brought, his estate is declared insolvent.

7. When, by any act or promise of the indorser, the plaintiff is induced to delay bringing such suit.

Hall v. Chilton, 3 Ala. 633; Lindsay v. Williams, 17 Ala. 229; Goggins v. Smith, 35 Ala. 683.

1781 (2116). **Irregular indorsements or assignments require suits.**—All assignments or indorsements in writing of contracts which are not governed by the commercial law, whether regular or irregular, must be construed as within the meaning of the last three sections, unless the contrary clearly appears from such assignment or indorsement.

Jordan v. Garnett, 3 Ala. 610; Hall v. Chilton, Ib. 633; Nesbit v. Bradford, 6 Ala. 746; Fulford v. Johnson, 15 Ala. 385.

1782 (2117). **The assignor pays the costs of suit against the maker.**—The costs in the suit against the maker in such assigned or indorsed contract are recoverable in the suit against the assignor or indorser.

CHAPTER 5.

COLLATERAL SECURITIES; PLEDGES.

1783. Receipt given for collaterals.—All banking, insurance and other corporations, private bankers, brokers and other persons engaged in the business of making discounts, or lending money, or taking or receiving a collateral for a loan or discount, if demanded, must give to the borrower, or to his agent or attorney, a receipt or acknowledgment in writing, designating or describing the collateral taken or received, and stating the character of the debt, the time of its maturity, and amount, for the payment of which such collateral is intended as security. If negotiable bonds are taken or received as collateral, the receipt or acknowledgment must, if such bonds are numbered, state the series number thereof. No title to such collateral shall pass, if there be a willful neglect or refusal to give such acknowledgment or receipt. Jan. 27, 1883, p. 35.

1784. Pledges or collaterals not transferable.—Collateral securities taken, or property pledged, to secure the payment of a debt, must not, without a transfer of the debt, be transferred or assigned otherwise than is hereinafter provided. A transfer of the debt passes to the transferee the right of the transferor in such collateral security or property pledged. A transfer or assignment of such security or property pledged, not accompanied by a transfer of the debt, is a discharge of the hypothecation or pledge, restoring the right and title of the person from whom it was received. Feb. 23, 1883, p. 197, sec. 6.

1785. Sale of collaterals or pledges.—On the maturity and non-payment of the debt for the security of which collateral security, or a pledge is taken and received, the creditor or the transferee of the debt may, after having given to the debtor, or a person from whom such security or pledge was received, if he reside within the county, two days' notice in writing of the intention to sell (which notice may be left at his residence or place of business, or sent through the mail, postage prepaid), make sale at public outcry of such security or pledge, and on such sale may transfer or assign the same; and such transfer or assignment shall vest in the transferee or assignee all the right and title of the person from whom such security or pledge was taken or received, and all the right and title of the creditor or his assignee or transferee. Such sale may be made by the personal representative of the creditor, or of the transferee of the debt. If the debtor or person from whom such security or pledge was received, do not reside within the county, notice of the intention to sell is not necessary. Ib. secs. 1, 2.

1786. Notice and place of sale.—Before making such sale, notice of the time and place thereof must be given for at least five days, by advertisement in some public newspaper published in the county, or if there be not a newspaper published in the county, by posting notice at the court-house door and three other public places in the county; such notice must describe the securities or property, but, without the consent of the debtor, or person giving the security or pledge, need not state his name, Ib. secs. 2, 5.

nor mention or describe the debt for which such security or pledge was taken. Such sale may be made at the court-house door, or at such other public place as may be selected at which sales at public outcry are usual.

Ib. secs. 3, 4.

1787. Surplus proceeds of sale.—If on such sale, after paying the costs and expenses thereof, and the debt, there remains any balance of the proceeds of sale, the same must be paid to the debtor or person from whom such security was taken or received, or to his assignee or transferee. If on demand, after receiving the proceeds of sale, the creditor, or his transferee, or the personal representative of the creditor or transferee, fail or neglect to pay such balance, the same shall bear interest at the rate of five per cent. per month.

TITLE III.

CONVEYANCES AND LOANS; REDEMPTION; DOWER; RIGHT OF ALIENS TO TAKE, HOLD AND TRANSMIT PROPERTY.

CHAPTER 1.—Conveyances and loans.
2.—Redemption of real estate sold under execution, decree, mortgage, or deed of trust.
3.—Dower.
4.—Right of aliens to take, hold and transmit property.

CHAPTER 1.

CONVEYANCES AND LOANS.

ARTICLE 1.—Who may make conveyances for the alienation of lands.
2.—Registration, acknowledgment and probate.
3.—Protection to creditors and purchasers against dormant conveyances.
4.—General provisions relating to the construction of conveyances.
5.—Satisfaction of mortgages.
6.—Perfecting imperfect titles.
7.—Grants by the state and the United States.

ARTICLE I.

WHO MAY MAKE CONVEYANCES FOR THE ALIENATION OF LAND.

1788 (2144). **Who may convey lands by deed or will.**—All persons of the age of twenty-one years, and not under a legal incapacity, may alien their lands, and any interest therein, whether immediate or future, certain or contingent, by instrument in writing, or by their last will, under the regulations prescribed by law.

1789 (2145). **Conveyances of land to be in writing; how executed.**—Conveyances for the alienation of lands must be written or printed, or partly written and partly printed, on

parchment or paper, and must be signed at their foot by the contracting party, or his agent having a written authority; or, if he is not able to sign his name, then his name must be written for him, with the words "his mark" written against the same, or over it; the execution of such conveyance must be attested by one witness, or, where the party cannot write, by two witnesses who are able to write, and who must write their names as witnesses.

O'Neal v. Robinson, 45 Ala. 526; Merritt v. Phenix, 48 Ala. 87; Scott v. Griggs, 49 Ala. 185; Hendon v. White, 52 Ala. 598; Harrison v. Simons, 55 Ala. 510; Goodlett v. Hansell, 56 Ala. 346; s. c., 66 Ala. 151; Lord v. Folmar, 57 Ala. 615; Bank v. Jones, 59 Ala. 123; Wilson v. Glenn, 62 Ala. 28; Clements v. Pearce, 63 Ala. 284; Steward v. Beard, 69 Ala. 470; Dugger v. Collins, Ib. 324; Stubbs v. Kahn, 64 Ala. 186; Weil v. Pope, 53 Ala. 585; Robinson v. O'Neal, 56 Ala. 541; Sharpe v. Orme, 61 Ala. 263; Rogers v. Adams, 66 Ala. 600; Coker v. Ferguson, 70 Ala. 284; Evans v. Richardson, 76 Ala. 329; Carlisle v. Carlisle, 78 Ala. 542.

1790 (2146). **Acknowledgment dispenses with necessity of witnesses.**—The acknowledgment, hereinafter provided for, operates as a compliance with the requisitions of the preceding section upon the subject of witnesses.

Weil v. Pope, 53 Ala. 585; Sykes v. Shows, 74 Ala. 382. See citations to preceding section.

ARTICLE II.

REGISTRATION, ACKNOWLEDGMENT AND PROBATE.

1791 (2147). **Record of conveyances.**—Conveyances of property, required by law to be recorded, must be recorded in the office of the judge of probate.

1792 (2148). **Books kept for recording, and mode of recording.**—Judges of probate are to procure, at the expense of their counties, large and well-bound books, in which must be recorded, in a fair hand, word for word, conveyances of property, with the acknowledgments, proofs, schedules, plats, surveys, etc., belonging thereto; and at the foot, or in the margin of the record of each conveyance, the day of the month and year of the delivery of the same for record must be specified. The judge making the record of any conveyance must certify on the same when it was received and recorded, and in what book and page the same is recorded, and must deliver it to the party entitled thereto, or his order, on the payment of the fees of registration; but the judge of probate may refuse to indorse "filed" on any conveyance, or to record the same, until such fees of registration are paid.

Jordan v. Mead, 12 Ala. 247; Parsons v. Boyd, 20 Ala. 112; Jones v. Parks, 22 Ala. 446; Mims v. Mims, 35 Ala. 23; Tillman v. Wood, 58 Ala. 578; Turner v. McFee, 61 Ala. 468.

1793 (2149). **Delivery operates as record.**—The conveyance is operative as a record from the day of the delivery to the judge; and any one delivering a conveyance for registration may require a receipt for the same, describing it by date, parties thereto and property conveyed.

Mims v. Mims, 35 Ala. 23; Turner v. McFee, 61 Ala. 468; Heflin v. Slay, 78 Ala. 180.

1794 (2150). **Access to record, and certified copies.**—Such judge must permit all persons to have free access to such books

during office hours, and furnish transcripts therefrom, with certificates, when required, upon the payment of lawful fees.

1795 (2151). **Penalty for neglect, and how enforced.**—If any judge of probate neglects or refuses to perform any of the duties required by this article, he is liable to a suit for damages to the party injured; and also to a penalty of two hundred dollars, which may be sued for by the county treasurer for the use of the county, or in his own name by the party aggrieved, for the joint use of himself and the county.

1796 (2152). **Real property recorded where land lies.**—Conveyances of real property must be recorded in the county in which such property is situate.

1797 (2153). **Record of conveyance operates as notice.** The recording in the proper office of any conveyance of property which may be legally admitted to record, operates as a notice of the contents of such conveyance, without any acknowledgment or probate thereof.

Notice only of instruments, the record of which is authorized by law.—McCain v. Wood, 4 Ala. 258; Stewart v. Kirkland, 19 Ala. 162; Fash v. Ravesies, 32 Ala. 451; Monroe v. Hamilton, 60 Ala. 226. **Instruments protected.**—Dudley v. Witter, 46 Ala. 664; Pierce v Jackson, 56 Ala. 599; Reed v. Smith, 14 Ala. 380; Twelves v. Nevill, 39 Ala 175. **Instruments not protected.**—McCain v. Wood, 4 Ala. 258; Stewart v. Kirkland, 19 Ala. 162; Fash v. Ravesies, 32 Ala. 451; Bailey v. Timberlake, 74 Ala. 221. **Notice of what rights or claims.**—Fenno v. Sayre, 3 Ala. 458; Minell v. Reed, 26 Ala. 730; Monroe v. Hamilton, 60 Ala. 226; Lehman v. Collins, 69 Ala. 127. **To whom record is notice.**—Steele v. Adams, 21 Ala. 534; Gimon v. Davis, 36 Ala. 589 (declaring Center v. P. & M. Bank, 22 Ala. 743, dictum). **Registration notice, though instrument not acknowledged or probated.** Merritt v. Phenix, 48 Ala. 87; Bickley v. Keenan, 60 Ala. 293.

1798 (2154). **When self-proving; certified copy evidence.** Conveyances of property, whether absolute or on condition, which are acknowledged or proved according to law, and recorded within twelve months from their date, may be received in evidence in any court without further proof; and if it appears to the court that the original conveyance has been lost or destroyed, or that the party offering the transcript has not the custody or control thereof, the court must receive a transcript, duly certified, in the place of such original.

When conveyance self-proving.—Hart v. Ross, 57 Ala. 518; s. c. 64 Ala. 96; Parsons v. Woodward, 73 Ala. 348. **When not.**—Keller v. Moore, 51 Ala. 340; Sharpe v. Orme, 61 Ala 263; Baucum v. George, 65 Ala. 259; Boykin v. Smith, Ib. 294; Dugger v. Collins, 69 Ala. 324; Coker v. Ferguson, 70 Ala. 284; Roney v. Moss, 76 Ala. 491. **Certified copy as evidence.**—Harvey v. Thorpe, 28 Ala. 250; White v. Hutchings, 40 Ala. 253; Jones v. Walker, 47 Ala. 175; Hines v. Chancey, Ib. 637; Hendon v. White, 52 Ala 597; March v. England, 65 Ala. 275; Williams v. Bowdin, 68 Ala. 126; Huckabee v. Shepherd, 75 Ala. 342.

1799 (2155). **Officers authorized to take acknowledgments, etc., in this state.**—Acknowledgments and proofs of conveyances may be taken by the following officers within this state: Judges of the supreme and circuit courts and the clerks of such courts, chancellors, registers in chancery, judges of the courts of probate, justices of the peace and notaries public.

Halso v. Seawright, 65 Ala. 431.

1800 (2156). **Before whom taken in other states or foreign countries.**—Acknowledgments and proofs of conveyances may be taken within the United States, and beyond the State of Alabama, by judges and clerks of any federal court, judges of any court of record in any state, notaries public, or commissioners appointed by the governor of this state; beyond the

limits of the United States, such acknowledgments and proofs may be taken by the judge of any court of record, mayor, or chief magistrate of any city, town, borough, or county, notaries public, or by any diplomatic, consular, or commercial agent of the United States.

Keller v. Moore, 51 Ala. 340.

1801 (2157). **Power of attorney; how proved or acknowledged.**—Powers of attorney, or other instruments conferring authority to convey property, may be proved or acknowledged in the same manner, and must be received as evidence to the same extent, as conveyances.

1802 (2158). **Form of acknowledgment of conveyance.** The following is the form of the acknowledgment to be used in this state, on conveyances of every description admitted to record:

"The State of ———, } I (name and style of the officer), hereby
——— county. } certify that —— ——, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day, that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date. Given under my hand, this —— day of ———, A. D. 18—.

"A. B., Judge," etc. (or as the case may be).

When sufficient.—Carter v. Doe, 21 Ala. 72; Sharpe v. Orme, 61 Ala. 263; Coker v. Ferguson, 70 Ala. 284. **When insufficient.**—Merritt v. Phenix, 48 Ala. 87; Keller v. Moore, 51 Ala. 340; Boykin v. Smith, 65 Ala. 294; Rogers v. Adams, 66 Ala. 600; Coker v. Ferguson, 70 Ala. 284; Roney v. Moss, 76 Ala. 491. **Effect when attacked.**—Barnett v. Proskauer, 62 Ala. 486; Smith v. McGuire, 67 Ala. 34; Moog v. Strang, 69 Ala. 98; VanCleave v. Wilson, 73 Ala. 387.

1803 (2159). **Form of probate of conveyance.**—The form of a probate of a conveyance is as follows:

"The State of ———, } I (name and style of the officer), hereby
——— county. } certify that —— ——, a subscribing witness to the foregoing conveyance, known to me, appeared before me this day, and being sworn, stated that —— ——, the grantor, voluntarily executed the same in his presence, and in the presence of the other subscribing witness, on the day the same bears date; that he attested the same in the presence of the grantor, and of the other witness, and that such other witness subscribed his name as a witness in his presence. Given under my hand, this —— day of ———, A. D. 18—.

"A. B., Judge," etc. (or as the case may be).

Hines v. Chancey, 47 Ala. 637; Hart v. Ross, 57 Ala. 518; Harrison v. Sims, 55 Ala. 510.

1804 (2160). **Conveyance to be proved or acknowledged in order to obtain benefit of registration.**—All conveyances admitted to record on proof must be attested by two witnesses, and the proof or acknowledgment must comply substantially with the foregoing forms, or the conveyances lose the privileges conferred by section 1798 (2154).

1805 (2161). **Certain conveyances by married women void, unless acknowledged or attested.**—Conveyances by married women of real property, or any interest therein, stocks in incorporated companies, or shares in manufacturing associations,

are inoperative, unless attested by two witnesses, or acknowledged in the mode and before the officer hereinbefore specified for taking acknowledgment of conveyances.

1806 (2162). **Mortgages, etc., of personal property; where recorded.**—Conveyances of personal property to secure debts, or to provide indemnity, must be recorded in the county in which the grantor resides, and also in the county where the property is at the date of the conveyance; and if before the lien is satisfied the property is removed to another county, the conveyance must be again recorded within six months from such removal, in the county to which it is removed.

1807 (2163). **Incumbrances on personal property brought to the state; where recorded.**—Whenever any personal property is subject to any lien, incumbrance, mortgage, or trust for the security of debts, at the time of its removal to this state, the writing evidencing the lien, incumbrance, mortgage, or trust must be recorded in the county into which it is brought, and remains, within four months of the arrival of such property.

1808 (2164). **Record of conveyance of personal property brought into state by tenant for life, etc.**—Whenever any person, having an estate for life or years in personal property, removes to this state with such property, the conveyance creating such estate must be recorded in the county to which it was brought, within twelve months thereafter; and if such property is removed to another county, then in such county within four months after its removal thereto; or such property must be taken to vest absolutely in such person, as to purchasers and creditors without notice.

Twelves v. Nevill, 39 Ala. 175.

1809 (2165). **Choses in action not personal property.** Things in action are not included in the words "personal property" in this article.

ARTICLE III.

PROTECTION TO CREDITORS AND PURCHASERS AGAINST DORMANT CONVEYANCES AND LOANS.

As amended, Feb. 28, 1887, p. 147.

1810 (2166). **Conveyances of realty securing debts contemporaneously executed; when recorded; effect of failure.** Conveyances of unconditional estates and mortgages, or instruments in the nature of a mortgage, of real property, to secure any debt created at the date thereof, are void as to purchasers for a valuable consideration, mortgagees and judgment creditors, having no notice thereof, unless recorded within thirty days from their date.

Who within protection of the statute.—Ohio Ins. Co. v. Ledyard, 8 Ala. 866; Daniel v. Sorrells, 9 Ala. 436; Center v. P. & M. Bank, 22 Ala. 743; Gimon v. Davis, 36 Ala. 589; Fash v. Ravesies, 32 Ala. 451; Devendell v. Doe, 27 Ala. 156; Pepper v. George, 51 Ala. 190; Saffold v. Wade, Ib. 214; Gafford v. Stearns, Ib. 434; Betz v. Mullin, 62 Ala. 365; Lehman v. Shook, 69 Ala. 486; Wood v. Lake, 62 Ala. 489; Watt v. Parsons, 73 Ala. 202; Tutwiler v. Montgomery, Ib. 263; Chadwick v. Carson, 78 Ala. 116. **Possession is constructive notice.**—Boyd v. Beck, 29 Ala. 704; Steele v. Adams, 21 Ala. 534, McCorkle v. Amarine, 12 Ala. 17; Smith v. Zurcher, 9 Ala. 208; Wood v. Lake, 62 Ala. 489; Hendricks v. Kelly, 64 Ala.

388; Sawyers v. Baker, 66 Ala. 292; Brunson v. Brooks, 68 Ala. 248; Pique v. Arendale, 71 Ala. 91; Bernstein v. Humes, Ib. 261; McCarthy v. Nicrosi, 72 Ala. 332; Watt v. Parsons, 73 Ala. 202. **As to other points,** see citations to section 1797.

1811 (2167). **Conveyances of realty securing pre-existing debts; when recorded; effect of failure.**—All other conveyances of real property, mortgages, or deeds of trust to secure any debts, other than those specified in the preceding section, are inoperative and void, as to purchasers for a valuable consideration, mortgagees and judgment-creditors, without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees, or judgment-creditors.

See citations to preceding section.

1812 (2168). **Defeasance of absolute conveyance also to be recorded.**—The two preceding sections include absolute conveyances of real property defeasible by a defeasance or other instrument, in which case such defeasance or instrument must be recorded, according to its character, within the time limited in the two preceding sections, or it is void as to purchasers for a valuable consideration, mortgagees and judgment-creditors of the original grantee without notice.

1813 (2169). **Remainders, after estate for life in realty; when and as to whom void.**—All wills and conveyances, creating estates in lands in remainder or reversion, or upon a condition, after an estate for life or lives, are inoperative and void, as against the creditors of the tenant for life or lives in possession, after a possession of five years by such tenant, unless the will or conveyance be recorded within five years from the entry and possession of such tenant.

1814 (2170). **Conveyances of personalty securing debts, etc.; when recorded; effect of failure.**—Conveyances of personal property to secure debts, or to provide indemnity, are inoperative against creditors and purchasers without notice, until recorded, unless the property is brought into this state subject to such incumbrances, in which case four months are allowed for the registration of the conveyance; and if such property is removed to a different county from that in which the grantor resides, the conveyance must be recorded in such county within six months from the removal, or it ceases to have effect after such six months against creditors or purchasers of the grantor without notice.

Michan v. Wyatt, 21 Ala. 813; Hardaway v Semmes, 38 Ala. 657; Rowland v. Plummer, 50 Ala. 182; Pierce v. Jackson, 56 Ala. 599; Holman v. Locke, 51 Ala. 287; Dudley v. Abner, 52 Ala. 572; Sumner v. Woods, Ib. 94; s. c., 67 Ala. 139; Fairbanks v. Eureka Co., Ib. 109; Sanders v. Knox, 57 Ala. 80. See, also, citations to sections 1797 and 1810.

1815 (2171). **Defeasance of absolute conveyances also to be recorded.**—The preceding section includes absolute conveyances of personal property, defeasible by a defeasance or other instrument; and in such case the defeasance must be recorded according to the provisions of such section, or the same is void as to creditors and purchasers from the grantee without notice.

1816 (2172). **Marriage settlements; when recorded; effect of failure.**—Personal property conveyed in consideration of marriage, when the possession remains with the husband, or the husband and wife, must be taken as the property of the husband, in favor of purchasers without notice, and cred-

itors, unless such conveyance is recorded in the county of the husband's residence, within twelve months after such possession commenced in this state; and if the husband removes to another county, within four months after such removal.

1817 (2173). **Loans in writing, remainders, etc., in personalty void, unless recorded within three years.**—All loans in writing, wills, or conveyances creating estates in personal property, on condition, in reversion, or remainder, or in which the use is separated from the right, other than the conveyances hereinbefore in this article specified, and under which possession is suffered to remain for three years with the party entitled to the estate or use, vest an absolute estate in the person so having possession for such number of years, as to creditors and purchasers of such person, unless such loan, will, or conveyance is recorded within such time in the county where such property is.

1818 (2174.) **Loans of personalty for three years; effect of, unless suit brought.**—All loans of personal property, not in writing, vest an absolute estate in the person in possession under such loan, as to purchasers and creditors of such person, after three years from the commencement of such loan, unless within that time the lender commence an action at law, in good faith, for the recovery of the property.

Brainard v. McDevitt, 21 Ala. 119; Carew v. Love, 30 Ala. 577; Durden v. McWilliams, 31 Ala. 206; s. c., 36 Ala. 345; Montgomery v. Kirksey, 26 Ala. 172.

1819 (2175). **Conveyances of personalty to minors; effect of failure to record for three years.**—All conveyances of personal property in favor of minor children, except by will, where the custody, control and visible possession thereof is suffered to remain by the donor with the father or mother of such children, vest an absolute estate in such father or mother so in possession, in favor of the purchasers from, and creditors of such father or mother, without notice, unless the conveyance is recorded within three years after such possession commenced in this state, in the county of the residence of such father or mother.

1820 (2176). **Parol gifts of personal property; when void.** Parol gifts of personal property are inoperative, until the custody, control, management and use of the property passes from the donor to the donee, and is possessed by such donee, or his agent; when the donee is a minor living with his parents, or either of them, the possession of the father, or parent with whom he is living, must be considered the possession of the child.

See Ragsdale v. Norwood, 38 Ala. 21.

Dec. 12, 1884, p. 83.

1821. Contracts for conditional sale of railroad rolling stock.—Contracts for the conditional sale of railroad equipment or rolling stock, by the terms of which the vendor retains the title until payment of the purchase-money, and the purchaser obtains possession, are void against the judgment-creditors of the purchaser without notice, or purchasers from him for a valuable consideration without notice, unless such contracts are in writing, and, within three months after the making thereof, recorded in the office of the judge of probate of the county in which such corporation may have its principal office or place of business; and if it has not in this state a

principal office or place of business, then in the office of the secretary of state; and, in addition, all cars or engines so sold must have thereon, plainly marked, the name of the vendor.

1822. Such contract, or a certified copy thereof, may be received in evidence.—Such contract, when the execution thereof has been acknowledged or proved before an officer having authority to take and certify the acknowledgment of conveyances, and when such contract has been duly recorded, must be received in evidence without other proof of execution; and if the original of such contract is lost or destroyed, or the party offering in evidence a certified transcript has not the custody or control thereof, a certified transcript from the record thereof must be received in evidence without other proof of the execution of the original. Ib. sec. 3.

ARTICLE IV.

GENERAL PROVISIONS RELATING TO THE CONSTRUCTION OF CONVEYANCES.

1823 (2177). **Attornment of tenant dispensed with.**—Every conveyance of an estate in any hereditament, corporeal or incorporeal, is good and effectual without attornment of the tenant; but no tenant who has paid his rent without notice of such conveyance is liable therefor.

Otis v. McMillan, 70 Ala. 46; Comer v. Sheehan, 74 Ala. 459.

1824 (2178). **All conveyances of lands construed as fees unless expressly limited.**—Every estate in lands is to be taken as a fee-simple, although the words necessary to create an estate of inheritance are not used, unless it clearly appears that a less estate was intended.

Wharton v. Moragne, 62 Ala. 201.

1825 (2179). **Fee-tail equivalent to fee-simple.**—Every estate in real or personal property in fee-tail, now or hereafter created, becomes an estate in fee-simple, and the person in whom such a conditional fee vests has the same power over the estate as in case of pure and absolute fees.

Simmons v. Augustin, 3 Port. 69; Martin v. McRee, 30 Ala. 116.

1826 (2180). **A contingent remainder in lands is equivalent to an executory devise.**—No estate in lands can be created by way of contingent remainder; but every estate created by any will or conveyance, which might have taken effect as a contingent remainder, has the same properties and effect as an executory devise.

1827 (2181). **Remainder limited after death without heirs or issue; how construed.**—Where a remainder in real or personal property is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word "heirs," or "issue," must be construed to mean heirs or issue living at the death of the person named as ancestor.

1828 (2182). **Birth of posthumous child.**—Where a future estate is limited to "heirs," "issue," or "children," posthumous children are entitled to take the estate in the same manner as if born before the death of the parent. Any future estate depending upon the death of a person without heirs, issue, or

children, is defeated by the birth of a posthumous child of such person capable of taking by descent.

1829 (2183). **The rule in Shelley's case abolished.**—Where a remainder created by a deed or will is limited to the heirs, issue, or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the heirs, issue, or heirs of the body of such tenant for life, are entitled to take as purchasers by virtue of the remainder so limited to them.

Machin v. Machin, 15 Ala. 375; Williamson v. Mason, 23 Ala. 489; May v. Ritchie, 65 Ala 602; Robinson v. LeGrand, Ib. 111.

1830 (2184). **Tenant for life, etc., not to defeat a remainder dependent on his estate.**—No estate or interest of any person can be defeated, discontinued, or extinguished by the act of any third person having a possessory or ulterior interest, except in the cases especially provided by this Code.

1831 (2185). **Uses, trusts, etc., for mere benefit of third persons; how operative.**—No use, trust, or confidence can be declared of any land, or of any charge upon the same, for the mere benefit of third persons; and all assurances declaring any such use, trust, or confidence must be held and taken to vest the legal estate in the person or persons for whom the same is declared; and no estate or interest can vest thereby in any trustee.

You v Flinn, 34 Ala. 409; Tindal v. Drake, 51 Ala. 574; McBrayer v. Cariker, 64 Ala. 50; Jones v. Reese, 65 Ala. 134; Wilkinson v. May 69 Ala. 34; Doe v. Ladd, 77 Ala. 223; Webb v. Crawford, Ib. 440; Loeb v. McCullough, 78 Ala. 533.

1832 (2186). **Certain trusts may be created vesting legal title in trustee.**—Nothing in the preceding section contained shall prevent the conveyance of real or personal property, or the issues, rents and profits thereof, to another in trust for the use of the grantor, or of a third person, or his family, or for any other lawful purpose; but in such case the legal title vests in the trustee.

See citations to preceding section.

1833 (2187). **If perpetuity not created, lands conveyed for such terms as parties choose.**—Lands may be conveyed, within the limits fixed by law, so as to avoid perpetuities, and subject to such other restrictions as are imposed by this Code, for such terms as the owner thinks proper; and courts are enjoined to give effect in such cases to the intention and meaning of the parties.

1834 (2188). **Time for which lands conveyed to certain persons; perpetuity forbidden.**—Lands may be conveyed to the wife and children, or children only, severally, successively and jointly; and to the heirs of the body of the survivor, if they come of age, and in default thereof, over; but conveyances to other than the wife and children, or children only, cannot extend beyond three lives in being at the date of the conveyance, and ten years thereafter.

1835 (2189). **Trusts for accumulation merely; limitation upon extent.**—No trust of estate for the purpose of accumulation only can have any force or effect for a longer term than ten years, unless when for the benefit of a minor in being at the date of the conveyance, or if by will, at the death of the

testator; in which case the trust may extend to the termination of such minority.

1836 (2190). **Lease limited to twenty years.**—No leasehold estate can be created for a longer term than twenty years.

1837 (2191). **No survivorship between joint tenants.** When one joint tenant dies before the severance, his interest does not survive to the other joint tenants, but descends and vests as if his interest had been severed and ascertained.

Parsons v. Boyd, 20 Ala. 112.

1838 (2192). **Warranties by tenant for life.**—All warranties by any tenant for life are void as against those in remainder or reversion.

1839 (2193). **When covenants of warranty implied.**—In all conveyances of estates in fee, the words, "grant," "bargain," "sell," or either of them, must be construed, unless it otherwise clearly appears from the conveyance, an express covenant to the grantee, his heirs and assigns, that the grantor was seized of an indefeasible estate in fee-simple, free from incumbrances done or suffered by the grantor, except the rents and services that are reserved; and also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by the express words of such conveyance; and the grantee, his heirs, personal representatives and assigns may, in any action, assign breaches, as if such covenants were expressly inserted.

Roebuck v. Duprey, 2 Ala. 535; Andrews v. McCoy, 8 Ala. 920; Stewart v. Anderson, 10 Ala. 504; Griffin v. Reynolds, 17 Ala. 198; Chapman v. Abrahams, 61 Ala. 108; Jones v. Reese, 65 Ala. 134; Derrick v. Brown, 66 Ala. 162; Chambers v. Ringstaff, 69 Ala. 140; Wilkinson v. Searcy, 74 Ala. 243.

1840 (2194). **Writings importing to be sealed, so considered.**—All writings which import on their face to be under seal are to be taken as sealed instruments, and have the same effect as if the seal of the parties was affixed thereto.

Blackwell v. Hamilton, 47 Ala. 470.

1841 (2195). **Livery of seizin dispensed with.**—Livery of seizin is not necessary in any conveyance of lands, and the property and possession of the grantor pass as fully by his conveyance as if seizin had been formally delivered.

Pope v. Pickett, 65 Ala. 491.

1842 (2196). **Conveyance of greater estate by tenant for life, or years, passes his estate.**—A conveyance made by a tenant for life or years, purporting to convey a greater interest than he possesses, or can lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the estate which the tenant could lawfully convey.

Pope v. Pickett, 65 Ala. 487.

1843 (2197). **Responsibility of payer for money paid to trustee.**—In all cases in which a payment has been, or may be made to a trustee authorized to receive the same, the person making such payment is not responsible for its application according to the trusts, nor can any right or title derived from such trustee, in consideration of such payment, be impeached on account of any misapplication of the same, unless it be made to appear that the person making such payment colluded with the

trustee, or knew of his intention to waste or mismanage the funds.

1844 (2198). **Power to sell lands in mortgage follows assignment of debt.**—Where a power to sell lands is given to the grantee in any mortgage, or other conveyance intended to secure the payment of money, the power is part of the security, and may be executed by any person, or the personal representative of any person, who, by assignment or otherwise, becomes entitled to the money thus secured.

Graham v. Newman, 21 Ala. 497; Lewis v. Wells, 50 Ala. 198; McGuire v. Van Pelt, 55 Ala. 344; Buel v. Underwood, 65 Ala. 285; Sloan v. Frothingham, Ib. 593

1845 (2199). **Trusts in lands; how created; exception.** No trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney lawfully authorized thereto in writing.

Caple v. McCollum, 27 Ala. 461; Robison v. Robison, 44 Ala. 227; Patton v. Beecher, 62 Ala. 579; Lehman v. Lewis, Ib. 129; McVey v. Parker, 64 Ala. 493; Rose v. Gibson, 71 Ala. 35; Whaley v. Whaley, Ib. 159; Nettles v. Nettles, 67 Ala. 599; Harden v. Darwin, 66 Ala. 55; Stringfellow v. Ivie, 73 Ala. 209; Kelly v. Karsner, 72 Ala. 106; Preston v. McMillan, 58 Ala. 84.

1846 (2200). **Trusts void as to parties without notice.** No such trusts, whether implied by law, or created or declared by the parties, can defeat the title of creditors, or purchasers for a valuable consideration, without notice.

Preston v. McMillan, 58 Ala. 84; Robison v. Robison, 44 Ala. 227; Walker v. Elledge, 65 Ala. 51; Dickerson v. Carroll, 76 Ala. 377.

1847 (2201). **Record of declaration of trust notice to all persons.**—When a trust is created or declared by any such instrument in writing, the recording thereof in the county where the lands lie is equivalent to actual notice to every person claiming under a conveyance made, or lien created after such recording.

See citations to preceding section.

1848 (2202). **On death of trustee estate not to pass to his heirs, etc.**—Upon the death of a sole or surviving trustee of an express trust, the trust estate does not descend to his heirs, or pass to his personal representatives.

McDougald v. Carey, 38 Ala. 320.

1849 (2203). **Reservation of right of revocation; effect of.** When the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor must be taken as the absolute owner of the estate conveyed, as to the right of creditors and purchasers.

1850 (2204). **Power of disposition to owner of particular estate; effect of.**—When an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee absolute, as to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power is not executed, or the lands sold for the satisfaction of debts, during the continuance of such particular estate.

Alford v. Alford, 56 Ala. 350.

1851 (2205). **Effect of power of disposition in one not holder of particular estate.**—When a like power of disposition is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate which may be limited thereon; but absolute in respect to creditors and purchasers.

1852 (2206). **When, in such case, donee takes fee.**—In all cases where such absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the donee of the power, he is entitled to an absolute fee.

1853 (2207). **Absolute power of disposition defined.**—Every power of disposition is deemed absolute, by means of which the donee of such power is enabled in his life-time to dispose of the entire fee for his own benefit; and where a general and beneficial power to devise the inheritance is given to a tenant for life or years, it is absolute within the meaning of the last two sections.

1854 (2208). **What powers may be reserved.**—The grantor in any conveyance may reserve to himself any power beneficial, or in trust, which he may lawfully grant to another.

1855 (2209). **Conveyance under power good to extent of power.**—No disposition by virtue of a power is void in law or equity, on the ground that it is more extensive than was authorized by the power; but every estate or interest thus created is valid, so far as the same is embraced by the power.

1856 (2210). **Power executed as conveyances.**—No power of disposing of real estate can be executed, except by an instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under such power, if the person executing the power were the actual owner.

1857 (2211). **Power under will; how executed.**—When a power to dispose of lands is confined to a disposition by devise or will, the instrument of execution must be by will, duly executed as wills of real estate are required by law.

1858 (2212). **Execution of power, when directed to be executed by insufficient instrument.**—When the donor of a power has directed it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but may be executed by an instrument sufficient to pass such estate.

1859 (2213). **When disposition is directed to be made among several.**—When a disposition under a power is directed to be made by, between, or among several persons, without specifying the sum or share to be allotted to each, all the persons designated are entitled to an equal proportion; but when the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportion as the trustee of the power may think proper, the distribution or apportionment made by such trustee cannot be impeached in law or equity, on the ground that it is unsubstantial, illusory, or nominal.

1860 (2214). **Division of fund on death of trustee having a discretion.**—If the trustee of a power, with the right of selection, dies, leaving the power unexecuted, its execution may

be decreed in equity for the equal benefit of all the persons designated as the objects of the trust.

1861 (2215). **When consent of third person required, how expressed.**—When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed; or must be certified in writing thereon; in the first case, the instrument, and in the second, the writing must be signed by the party whose consent is required.

March v. England, 65 Ala. 275.

1862 (2216). **Disposition among children; grandchildren may take under power.**—When a disposition under an appointment or a power is directed to be made to or among the children of any person, without restricting it to any particular children, it may be exercised in favor of the grandchildren or other descendants of such person.

Collins v. Toomer, 69 Ala. 14.

1863 (2217). **Powers; when irrevocable.**—Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is contained or reserved in the instrument creating the power.

1864 (2218). **Sale of lands devised to executors to be sold, or when power of sale given them.**—When lands are devised to several executors, or a naked power given them by will to sell, the survivor or survivors, and the acting executor or executors, when any one or more of them resigns, or refuses to act, or is removed by a court of competent authority, and also an administrator with the will annexed, has the same interest in, and power over such lands for the purpose of making sale thereof, as the executors named in such will might have had.

Patton v. Crow, 26 Ala. 426; Perkins v. Lewis, 41 Ala. 649; Anderson v. McGowan, 42 Ala. 280; s. c., 45 Ala. 462; Tarver v. Haines, 55 Ala. 503; Marks v. Tarver, 59 Ala. 335; Mitchell v. Spence, 62 Ala. 450; Ex parte Dickson, 64 Ala. 188; Robinson v. Allison, 74 Ala. 254; Watson v. Martin, 75 Ala. 254; Werborn v. Austin, 77 Ala. 381.

1865 (2219). **Joint power executed by survivor in case of death.**—When a power is vested in several persons, and, previous to the execution, one or more of such persons dies, it may be executed by the survivor or survivors.

1866 (2220). **What powers liable to claims of creditors.** Every special and beneficial power is liable in equity to the claims of creditors, and the execution of the same may be decreed for their benefit.

1867 (2221). **Not to extend to simple power of attorney.** The provisions of this article in relation to powers do not extend to a simple power of attorney to convey lands in the name, and for the benefit of the owner.

ARTICLE V.

SATISFACTION OF MORTGAGES.

Feb. 13, 1879, p. 192.

1868. **Partial payment entered.**—A mortgagee, or the assignee or transferee of a debt secured by mortgage, who has received partial payment, if the mortgage is of record, must, on the request in writing of the mortgagor, or of a judgment-cred-

itor, or other creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, enter on the margin of the record of the mortgage the date and amount of such partial payment or payments. If, for thirty days after such request, the mortgagee, or the transferee or assignee fails to make such entry, he forfeits to the party making such request two hundred dollars.

1869 (2222, 2223). **Full payment or satisfaction entered.** If a mortgage which is of record has been fully paid or satisfied, the mortgagee, or the transferee or assignee of the mortgagee, who has received payment or satisfaction, must, on the request in writing of the mortgagor, or of a judgment, or other creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, enter the fact of payment or satisfaction on the margin of the record of the mortgage. Such entry operates a release of the mortgage, and is a bar to all suits thereon at law or in equity. If for three months after such request, the mortgagee, or assignee or transferee fails to make such entry, he forfeits to the party making the request two hundred dollars, unless there is pending, or there is instituted a suit within that time, in which the fact of payment or satisfaction is or may be contested. As amended. March 1, 1881, p. 32.

Jordan v. Mann, 57 Ala. 595; Grooms v. Hannon, 59 Ala. 510; Renfro v. Adams, 62 Ala. 302; Bell v. Wilkinson, 65 Ala. 477; Harris v Swanson, 67 Ala. 486; Williams v. Bowd n, 68 Ala. 126; Jarratt v. McCabe, 75 Ala. 325; Scott v. Field, Ib. 419.

1870. Payment of mortgage debt revests title.—The payment of a mortgage debt, whether the mortgage is of real or personal property, divests the title passing by the mortgage. Nov. 28, 1884, p. 73.

ARTICLE VI.

PERFECTING IMPERFECT TITLES.

1871 (2224). **Written contracts for conveyance; how executed on death of party.**—In all cases of written agreements, or contracts for the conveyance of lands in this state, where the person executing the same dies before the execution of the conveyance, the personal representative of such person may execute such conveyance according to the forms prescribed by law for the conveyance of real estate, to the person to whom such agreement or contract was made, his heirs, or assigns.

Driver v. Hudspeth, 16 Ala. 348.

1872 (2225). **Judge of probate may compel representatives to convey.**—If the personal representative refuses to execute the conveyance in the case provided for in the preceding section, he may be compelled so to do, by application to the judge of probate of the county in which letters testamentary or of administration were granted.

1873 (2226). **Application; contents and notice; conveyance coerced by imprisonment.**—Such application must be by petition, describing the contract or agreement, the lands to be conveyed, and stating the names of the heirs of the contracting party, which of them are of full age, and which minors; and the judge of probate must give notice of such petition by pub-

lication in some newspaper published in his county, and the county in which the lands lie; or, if none is published therein, the paper published in the place nearest to the county-site of such county, once a week for three successive weeks; and if, on the hearing of such application, it appears that such agreement or contract was fairly made, and the consideration or conditions of the same paid or performed, such judge must decree the conveyance to be executed by the personal representative of the party so contracting, according to the terms thereof; and such personal representative, failing to execute such conveyance in conformity with such decree, must be imprisoned until he executes the same; either party having the right to appeal, as on other final judgments and decrees of the probate court.

1874 (2227). **Notice given to guardians of minors.**—In all cases in which minor heirs are interested in such application, notice thereof must be given to the guardian; and if there is no guardian, the judge must appoint a guardian ad litem to protect their interest.

ARTICLE VII.

GRANTS BY THE STATE AND THE UNITED STATES.

1875 (2228). **Grants by state made by patent.**—For the conveyance of any real property belonging to the state, a patent issues under the seal of the state, signed by the governor, and attested by the secretary of state.

1876 (2229). **Grants and patents recorded.**—The secretary of state must record, in well-bound books, all grants and patents issued by the state.

1877 (2230). **Patent issues on payment, certified by treasurer.**—All purchasers of real property belonging to this state, their heirs and assigns, except in cases otherwise provided by this Code, are entitled to receive a patent therefor, on producing to the secretary of state a certificate signed by the state treasurer, that the amount due for such real estate has been paid into the state treasury.

1878 (2231). **Patents may be recorded, and copies received as evidence.**—Any persons, having patents from this state or the United States to lands in this state, may have the same recorded in the office of the judge of probate of the county in which such lands lie; and a certified copy of such record is evidence in any court of this state.

CHAPTER 2.

REDEMPTION OF REAL ESTATE SOLD UNDER EXECUTION, DECREE, MORTGAGE, OR DEED OF TRUST.

1879 (2877). **Redemption by debtor.**—Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in chancery, or under any deed of trust, or power of

sale in a mortgage, the same may be redeemed by the debtor from the purchaser, or his vendee, within two years thereafter, in manner following.

Right not subject to levy and sale under attachment or execution.—Central Mining Co. v. Stoven, 45 Ala. 594; Childress v. Monette, 54 Ala. 317; Jenkins v. Lovelace, 72 Ala. 303; Bailey v. Timberlake, 74 Ala. 221. **Right neither property nor right of property.**—Otis v. McMillan, 70 Ala. 46. **Right cannot be waived by mortgagor by contemporaneous agreement.**—Parmer v. Parmer, 74 Ala. 285. **Statute constitutional with respect to pre-existing creditors.**—Iverson v. Shorter, 9 Ala. 713. **Changes in former statutes by present statute.**—Posey v. Pressley, 60 Ala. 243. **Right not perfect until statutory requirements have been complied with.** Spoor v. Phillips, 27 Ala. 193; Cramer v. Watson, 73 Ala. 127.

1880 (2878). **Possession delivered on demand; notice to tenant dispenses with attornment.**—The possession of the land must be delivered to the purchaser, within ten days after the sale thereof, by the debtor, if in his possession, on demand of the purchaser or his vendee. If the land is in the possession of a tenant, notice to him by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of the sale, and that it has not been redeemed, vests the right to the possession in him, in the same manner as if such tenant had attorned to him.

Delivery of possession a condition precedent.—Stocks v. Young, 67 Ala. 341. **Averments of, on bill to redeem.**—Bondurant v. Sibley, 29 Ala. 570; Paulling v. Meade, 23 Ala. 505; Sandford v. Ochtalomi, Ib. 669. **Purchaser entitled to possession until he is put in default.**—Spoor v. Phillips, 27 Ala. 193. **Effect of notice to tenant.**—Comer v. Sheehan, 74 Ala. 452. **Rents and profits.**—Spoor v. Phillips, 27 Ala. 193; Weathers v. Spears, Ib. 455; Carlin v. Jones, 55 Ala. 624; Cramer v. Watson, 73 Ala. 127; Parmer v. Parmer, 74 Ala. 285.

1881 (2879). **Purchase-money and ten per cent. also, to be tendered.**—The debtor must also pay or tender to the purchaser or his vendee the purchase-money, with ten per cent. per annum thereon, and all other lawful charges; and such payment or tender has the effect to re-invest him with the title; and if a conveyance has been made to the purchaser, he must, at the costs of the debtor, convey to him such title as he acquired by the purchase.

Provision revesting title, on tender, does not extend to alienee of defendant, Searcy v. Oates, 68 Ala. 111. **To whom tender should be made.**—Camp v Simon, 34 Ala. 126; Lehman v. Collins, 69 Ala. 127; Couthway v. Berghaus, 25 Ala. 393; Barringer v. Burke, 21 Ala. 765. **When tender insufficient.**—Harris v. Miller, 71 Ala. 26; Cramer v. Watson, 73 Ala. 127; Couthway v. Berghaus, 25 Ala. 393; Camp v. Simon, 34 Ala. 126. **May be made by agent through letter sent by another.**—Couthway v. Berghaus, 25 Ala. 393. **Mere tender does not revest title.** Smith v. Anders, 21 Ala. 782. **Effect of, in court of law.**—Harris v. Miller, 71 Ala. 26. **As to objection that party was unauthorized to make tender.**—Couthway v. Berghaus, 25 Ala. 393; Lampley v. Weed, 27 Ala 621. **Bill to redeem must show tender made before bill filed, or sufficient excuse for not making.**—Spoor v. Phillips, 27 Ala. 193 (overruling Freeman v. Jordan, 17 Ala. 500); Paulling v. Meade, 23 Ala. 505; Carlin v. Jones, 55 Ala. 624; Lehman v. Collins, 69 Ala. 127. **Absence from state a sufficient excuse.**—Spoor v. Phillips, 27 Ala. 193; Trimble v Williamson, 49 Ala. 527; Lehman v. Collins, 69 Ala. 127. **Necessary averments of bill to redeem.**—Stocks v. Young, 67 Ala 341. **Plea of tender to be accompanied with payment of money.**—Alexander v. Caldwell, 61 Ala. 543; Caldwell v. Smith, 77 Ala. 158. **Response to tender, once made, is final.**—Walker v. Ball, 39 Ala. 298. **Lawful charges.**—Griggs v. Banks, 59 Ala. 311; Harris v. Miller, 71 Ala. 26; Lehman v. Collins, 69 Ala. 127; Cramer v. Watson, 73 Ala. 127; Parmer v. Parmer, 74 Ala. 285; Holden v. Rison, 77 Ala. 515; Couthway v. Berghaus, 25 Ala. 393; Posey v. Pressley, 60 Ala. 243.

1882 (2880). **Writ of unlawful detainer lies on refusal to deliver possession.**—If the possession of the land has been delivered to the purchaser by the debtor, and upon payment or tender as aforesaid, it is not restored to him, he may recover

possession by a suit for unlawful detainer before a justice of the peace.

Johnsen v. Nabring, 50 Ala. 392; Posey v. Pressley, 60 Ala. 243.

1883 (2881). **Judgment-creditors allowed to redeem.**—All judgment-creditors of the debtor, who, without fraud or collusion, had obtained such judgment before the sale of the land, or within two years thereafter, except by confession of the debtor, may in like manner redeem the land from such purchaser, or any one claiming under him, by paying or tendering the amount bid for such land at the sale thereof, and ten per cent. per annum thereon, together with all lawful charges; and by further offering to credit the debtor upon a subsisting judgment with a sum at least equal to ten per cent. of the amount originally bid for the land; and upon such payment or tender being made, and credit actually given to the debtor, the title to such land vests in the creditor, and the purchaser must convey to him such title as he has, at the costs of the creditor.

Who are judgment-creditors.—Garner v. Gardner, 49 Ala. 167; Branch Bank v. Furniss, 12 Ala. 367. **Creditor in judgment by foreign justice not within statute.** Freeman v. Jordan, 17 Ala. 500 **Creditor in execution under which land was sold, within statute.**—Freeman v. Jordan, 17 Ala. 500; Posey v. Pressley, 60 Ala. 243. **What a subsisting judgment.**—Mooney v. Parker, 18 Ala 708. **Rights acquired by redemption.**—Lehman v. Shook, 69 Ala. 486. **Right not affected by bankruptcy of defendant.**—Trimble v. Williamson, 49 Ala. 527. **Statutory and common-law rights of mortgagor distinguished.**—Cramer v. Watson, 73 Ala. 127. **Chancery cannot extend right to general creditors, though debts ascertained by the decree.**—Seals v. Pheiffer, 77 Ala. 278. **Sufficient if creditor offers to give credit.**—Moore v. Gore, 35 Ala. 701; Walker v. Ball, 39 Ala. 298. **Right as between several mortgagees.** Wiley v. Ewing, 47 Ala. 418. **As to right of purchaser from mortgagor after sale.** Carlin v Jones, 55 Ala. 624. **Use of confessed judgment in resisting redemption also prohibited.**—Mobile Ins. Co. v. Steele, 61 Ala. 253. See, also, citations to section 1881.

1884 (2882). **When purchaser, etc., may refuse to allow redemption.**—But if the purchaser, or person claiming under him, agrees to credit, and actually does credit the debtor, upon a subsisting judgment, with the sum offered to be credited by the creditor, he may retain the land, unless the creditor make a further offer to credit the debtor, upon a subsisting judgment, with an additional sum, not less than ten per cent. on the original purchase-money, to which the purchaser, as hereinbefore provided for, is required to respond by offering to give the debtor a similar credit; and upon his failure to do so, and upon the credit being actually given by the creditor to the debtor, and the payment or tender of the purchase-money, with ten per cent. per annum thereon, as aforesaid, to the purchaser, the title vests in such creditor.

1885 (2883). **Redemption by one creditor from another.** One creditor may in like manner, within two years from the sale of the land, redeem it from another creditor; and in that case, the creditor offering to redeem must pay or tender to the creditor in possession the amount he had to pay to obtain the land, with ten per cent. per annum thereon, and must offer to credit the debtor as provided in the preceding section.

1886 (2884). **Creditor entitled to writ of unlawful detainer.** A creditor has also the right to recover the possession of the land before a justice of the peace, as for an unlawful detainer.

1887 (2885). **Certain parties deemed creditors.**—When the plaintiff in execution, mortgagee, or beneficiary in a deed of

trust is the purchaser, he is considered a creditor within this chapter, to the extent to which his judgment, mortgage, or deed of trust remains unsatisfied.

1888 (2886). **If parent has conveyed to child, he may redeem.**—When land has been conveyed by a parent to a child, and sold as the property of the parent, the child has the right to redeem within the time, and upon the terms as provided in this chapter.

1889 (2887). **Value of permanent improvements to be paid; value ascertained by referees.**—Any person offering to redeem must pay to the person in possession the value of all permanent improvements made by him after he acquired title. If the parties cannot agree upon the value of the improvements, each must appoint a referee to ascertain the value thereof, who, if they cannot agree, must appoint an umpire, and they must make their award within three days, which is final between the parties.

Posey v. Pressley, 60 Ala. 243; Cramer v. Watson, 73 Ala. 127; Parmer v. Parmer, 74 Ala. 285; Weathers v. Spears, 27 Ala. 455.

1890 (2888). **On refusal to appoint a referee, penalty.**—If the person offering to redeem declines to nominate a referee, he must pay the value put upon the improvements by the person in possession. If the latter, after an appointment by the former, refuses to make such appointment, he forfeits his claim to compensation for such improvements.

Cramer v. Watson, 73 Ala. 127.

1891 (2889). **Redemption by and from representatives of estates.**—The right of redemption secured hereby may be asserted, within the time limited, by the executor or administrator of the debtor, by his heirs or devisees, or by the executor or administrator of any judgment-creditor of the debtor, and against the executor or administrator of the purchaser of the land, or of his vendee.

CHAPTER 3.

DOWER.

ARTICLE 1.—In what dower consists, and how relinquished.
2.—Proceedings for the assignment of dower, and how assigned.

ARTICLE I.

IN WHAT DOWER CONSISTS, AND HOW RELINQUISHED.

1892 (2232). **Dower defined; of what lands widow is dowable.**—Dower is an estate for the life of the widow in a certain portion of the following real estate of her husband, to which she has not relinquished her right during the marriage:

1. Of all lands of which the husband was seized in fee during the marriage.
2. Of all lands of which another was seized in fee to his use.
3. Of all lands to which, at the time of his death, he had a perfect equity, having paid all the purchase-money therefor.

Of lands of which the husband was seized in fee. What within.—Boyd v. Hunter, 44 Ala. 705; Flinn v. Barber, 64 Ala. 193; Brewer v. Browne, 68 Ala. 210. **What not within.**—Eslava v. Lepretre, 21 Ala. 504; Edmondson v. Welsh, 27 Ala. 578; Boynton v. Sawyer, 35 Ala. 497; Brooks v. Woods, 40 Ala. 538; Pizzalla v. Campbell, 46 Ala. 35; Edwards v. Bibb, 54 Ala. 475. **Of lands of which another was seized to his use.**—Harrison v. Boyd, 36 Ala. 203; King v. King, 61 Ala. 479. **Of lands to which he had a perfect equity.**—Gillespie v. Sommerville, 3 Stew. & Port. 447; Lewis v. Moorman, 7 Port. 522; Edmonson v. Montague, 14 Ala. 371; Crabb v. Pratt, 15 Ala 843; Boyd v. Harrison, 36 Ala. 533; Mattox v. Feagan, 57 Ala. 274; Lipscomb v. DeLeon, 68 Ala. 592; Pettus v. McKinney, 74 Ala. 108. **Governed by law of force at death of husband.**—Boyd v. Harrison, 36 Ala. 533; Ware v. Owens, 42 Ala. 212. **When no rightful seizin in husband.**—Tillman v. Spann, 68 Ala. 102. **Proof of seizin.**—Steele v. Brown, 70 Ala 235. **Sale and conveyance under execution no bar.**—Irvine v. Armistead, 46 Ala. 363. **Right of widow of deceased heir, on sale for division.**—Chaney v. Chaney, 38 Ala. 35. **When not merged in fee.**—Humes v. Scruggs, 64 Ala 40. **When conveyance in fraud of dower right.**—Kelly v. McGrath, 70 Ala. 75.

1893 (2233). **Extent of widow's dower interest.**—The quantity of the dower interest is as follows:

1. When the husband dies leaving no lineal descendants, and his estate is not insolvent, his widow is entitled to be endowed of one-half his lands.

2. If in such case his estate is insolvent, to one-third part thereof.

3. When there are lineal descendants, then to one-third part thereof, whether the estate be solvent or not.

As amended, Feb. 17, 1885. pp. 126, 141

1894 (2234). **Relinquishment of dower; how made.**—The wife, if of the age of eighteen years, may relinquish her right to dower in land, by joining with her husband in a conveyance thereof, or by joining with her husband in a power of attorney, authorizing the attorney to convey the lands, or subsequently to a conveyance thereof by the husband, by a separate instrument executed by her alone; and in either case, her signature must be attested by two witnesses who are able to write, or acknowledged by her according to the form prescribed for the acknowledgment of other conveyances in this state.*

By joining in deed with husband.—Snodgrass v. Clark, 44 Ala. 198; Pepper v. George, 51 Ala. 190. **Supported by consideration to husband.**—Bailey v. Litten, 52 Ala. 282. **After sale, but before deed by husband, upheld.**—Nelson v. Holley, 50 Ala. 3. **Can only be relinquished by her in person.**—Eslava v. Lepretre, 21 Ala. 504. **Inchoate right cannot be assigned to stranger.**—Saltmarsh v. Smith, 32 Ala. 404; Barber v. Williams, 74 Ala 331; Johnston v. Smith, 70 Ala. 108; Turnipseed v. Fitzpatrick, 75 Ala. 297. **Nor is it available as a set-off.**—Saltmarsh v. Smith, 32 Ala. 404; Johnston v. Smith, 70 Ala. 108. **Wife cannot bar dower by agreement with husband during coverture.**—Martin v. Martin, 22 Ala. 86.

1895 (2235). **When she is out of the state.**—Married women, residing or living beyond the limits of this state, may in like manner convey or release their right of dower to any land within this state, such conveyance being acknowledged by them, as other conveyances executed beyond this state.

Feb. 26, 1883, p. 144, sec. 1.

1896. Relinquishment when wife insane.—If the wife is, and has been by a court of competent jurisdiction adjudged insane, the court of probate of the county of the residence of the husband may, on his application, appoint a suitable person commissioner, with authority for her and in her name to execute a relinquishment of her right of dower in the lands, or any part of the lands of the husband.

Ib. sec 1.

1897. Contents of application; proceedings thereon.—The application must be in writing and verified by affidavit, must

* "Or by joining with her husband in a power of attorney, authorizing the attorney to convey the lands," inserted by joint committee.

describe the lands in which it is proposed the dower of the wife shall be relinquished, and must state the age and health of the wife, and the estimated value of the lands, and also the age of the husband, and state of his health. The court must take the testimony of two or more credible witnesses in writing as to the value of the lands, and as to the sanity of the wife, and as to the age and health of husband and of wife, and ascertain the value of the right of dower. If the wife has a general guardian, notice of the application must be given to such guardian; and if she have no such guardian, notice must be given to such person as may have her care and custody; or if she have no guardian, or resides with and under the care and custody of the husband, or if he be her guardian, notice for her must be given to some suitable person of the appointment of the court. In all cases a guardian ad litem must be appointed to represent and defend for the wife.

1898. Guardian appointed for wife.—If the court ascertains that the wife is insane, and has been so adjudged by a court of competent jurisdiction, and she has not a general guardian, the court must appoint a guardian for her, to whom the value of her right of dower, as ascertained by the court, must be paid; but if she have a general guardian, the court may order such value to be paid to such guardian. On the payment thereof and the report of the fact of payment filed in the court, an order must be entered, appointing a commissioner with authority for, and in the name of the wife, to execute a relinquishment of her dower; and such relinquishment, when executed, has the same force and effect a relinquishment executed by the wife, if sane, would have. The costs of such proceeding must be paid by the applicant. Ib. sec. 2.

1899 (2237). **Wife joining in husband's conveyance not bound by warranty.**—Neither the wife individually, nor her separate estate is bound by the covenant of warranty contained in any deed conveying land belonging to the husband, executed by such wife in connection with her husband; but such deed shall have the effect only of a relinquishment of dower, unless there be in such deed a special covenant of the wife, expressing her intention to bind her separate estate.

ARTICLE II.

PROCEEDINGS FOR THE ASSIGNMENT OF DOWER.

1900 (2238). **Widow may retain dwelling, etc., until assignment of dower.**—The widow may retain possession of the dwelling-house where her husband most usually resided next before his death, with the offices and buildings appurtenant thereto, and the plantation connected therewith, until her dower is assigned her, free from the payment of rent.

When not entitled to possession of plantation.—Smith v. Smith, 13 Ala. 329; McAllister v. McAllister, 37 Ala. 484; Walters v. Williams, 38 Ala. 680; Weaver v. Crenshaw, 6 Ala. 873; Clary v. Sanders, 43 Ala. 287; Ogbourne v. Ogbourne, 60 Ala. 616; Melton v. Andrews, 76 Ala. 586. **When duty of heir to have dower assigned.**—Shelton v. Carrol 16 Ala. 148. **Widow's rights and duties when administratrix.**—Benagh v. Turrentine, 60 Ala. 557. **Quarantine depends on fact, not quantum of dower.**—Billingslea v. Glenn, 45 Ala. 540. **Character of interest.**

Barber v. Williams, 74 Ala. 331. **Marriage does not affect.**—Shelton v. Carrol, 16 Ala. 148. **Not dependent upon actual possession, nor affected by husband's alienation.**—Oakley v. Oakley, 30 Ala. 139. **Attaches only to premises of which she is dowable.**—Slatter v. Meek, 35 Ala. 528; Pizzala v. Campbell, 46 Ala. 35. **Rents or mesne profits.**—Inge v. Murphy, 14 Ala. 289; McLaughlin v. Godwin, 23 Ala. 846; Slatter v. Meek, 35 Ala. 528; Boynton v. Sawyer, Ib. 497; Perrine v. Perrine, Ib. 644; Tillman v. Spann, 68 Ala. 102; Steele v. Brown, 70 Ala. 235; Jenks v. Terrell, 73 Ala. 238.

1901 (2239). **Dower assigned by metes and bounds in probate court.**—When the dower interest can be assigned by metes and bounds, the widow, heir, or personal representative of the husband may petition the court of probate of the county where the land in which the dower is claimed, or any portion thereof, lies, to cause assignment of dower to be made.

Jurisdiction of probate court.—Snodgrass v. Clark, 44 Ala. 198; Benagh v. Turrentine, 60 Ala. 557; Humes v. Scruggs, 64 Ala. 40; Bradford v. Bradford, 66 Ala. 252; Turnipseed v. Fitzpatrick, 75 Ala. 297. **Jurisdiction of chancery court not affected.**—Owen v. Slatter, 26 Ala. 547; Brooks v. Woods, 40 Ala. 538; Irvine v. Armistead, 46 Ala. 363; Wood v. Morgan, 56 Ala. 397. **Jurisdiction of chancery court exclusive to award compensation or mesne profits.**—Barney v. Frowner, 9 Ala. 901; Beavers v. Smith, 11 Ala. 20; Smith v. Smith, 13 Ala. 329; Thrasher v. Pinkard, 23 Ala. 616; Slatter v. Meek, 35 Ala. 528; Waters v. Williams, 38 Ala. 680; Humes v. Scruggs, 64 Ala. 40.

1902 (2240). **What petition must contain.**—The petition must contain,—

1. The facts on which the widow's claim to dower rests, with a description of the land in which dower is claimed, by its designation at the land office, when that can be done; if not, by metes and bounds, or such other description thereof as will identify it.

2. When the land in which dower is claimed has been aliened in the life of the husband, the name of the alienee, and his residence, if known; if he is not in possession of the land, the name of the person in possession.

3. The names of the widow and heirs at law, stating which are minors and married women, and the name of the personal representative of the husband, stating the county in which each resides, if resident in this state, and which of them, if any, are non-residents.

Green v. Green, 7 Port. 19; Martin v. Martin, 22 Ala. 86; Forrester v. Forrester, 38 Ala. 119; s. c., 39 Ala. 320.

1903 (2241). **Notice to parties; day fixed for hearing.** Ten days' notice must be given to those adversely interested of the time when such petition will be filed, and an order for the assignment prayed; and thereupon, if the persons so notified are of full age, the court must proceed without delay to hear and determine the right to dower, unless good cause be shown for continuance.

1904 (2242). **Guardians ad litem appointed for minors.** If any of the persons adversely interested are minors, guardians ad litem must be appointed to protect their interests.

1905 (2243). **Proceedings when notice not given.**—If such notice has not been given, the court must appoint a time for hearing the petition, and cause all persons interested to be cited then to appear. If any are non-residents, publication must be made of the time when the petition will be heard, once a week for three successive weeks, in a newspaper published in the county; if there be none, then in the county nearest to the court-house thereof, which shall be notice.

1906 (2244). **What decree must contain, if widow entitled to dower.**—If, on the hearing of the petition, the court considers the widow entitled to dower in the lands described, a decree must be made that she is entitled to dower in certain lands, describing them, and of what portion thereof, and directing the sheriff to summon five freeholders, not connected with the parties by consanguinity or affinity, to allot and set off, by metes and bounds, the widow's dower, having regard to the improvements and quality of the land, as well as the quantity of the dower.

1907 (2245). **Oath of commissioners; dower set off by metes and bounds; return.**—Before proceeding to make the assignment, the commissioners must take an oath, which may be administered by the sheriff, impartially, and to the best of their skill and ability, to assign the dower pursuant to the decree. They must set off and allot, by metes and bounds, the lands assigned by them as dower, and make return thereof in writing, subscribed by them, to the judge of probate, which, if confirmed by the court, must be recorded, and vests in the widow an estate for her life in the lands so assigned as dower.

Johnson v. Neil, 4 Ala. 166; Adams v. Barron, 13 Ala. 205.

1908 (2246). **Dwelling-house assigned to widow, if estate solvent.**—When the estate of the husband is solvent, and the heirs will not thereby be prejudiced, the entire dwelling-house may be assigned to the widow as part of her dower in lieu of a corresponding portion of her dower in the land, equal in value to that portion of the dwelling-house of which she is not dowable as matter of right.

Langdon v. Stevens, 6 Ala. 730.

1909 (2247). **Jurisdiction when lands lie in different counties; exception.**—Land of which the widow may be endowed, lying in several counties, may be embraced in the same petition, and in such case the judge of probate may direct his writ to the sheriff of such counties, to summon five freeholders, as in other cases, to allot dower of the lands in their county (specifying them), according to the provisions of section 1906 (2244). But the court of probate has no jurisdiction to direct the allotment of dower out of the county, when the land has been aliened during the life of the husband.

1910 (2248). **When chancery court alone has jurisdiction.** When land, out of which dower is demanded, has been aliened by the husband, and from improvements made by the alienee, or from any other cause, an assignment of dower by metes and bounds would be unjust, the court of probate must decline jurisdiction, and application must be made to the court of chancery.

Barney v. Frowner, 9 Ala. 901; Beavers v. Smith, 11 Ala. 20; Thrasher v. Pinckard, 23 Ala. 616; Smith v. Johnson, 37 Ala 633; Snodgrass v. Clark, 44 Ala. 198; Wood v. Morgan, 56 Ala. 397.

1911 (2249). **Dowable of value of land; interest paid annually, unless certain sum agreed to.**—In such case the widow is dowable of the value of the land at the time of the alienation, the interest on one-third part thereof from the death of the husband, to be paid to her annually, during her life, and secured, if necessary, by a lien on the land, unless the parties

agree to a compensation in gross, which the court must give effect to.

Springle v. Shields, 17 Ala. 295; Francis v. Garrard, 18 Ala. 794; Ware v. Owens, 42 Ala. 212; Wood v. Morgan, 56 Ala. 397; Melton v. Andrews, 76 Ala. 586.

1912 (2250). **When judge of probate incompetent, petition may be made to circuit court.**—When the judge of probate is, from any cause, incompetent to sit, the petition may, if the party so elect, be filed in the circuit court, which is hereby invested with all the powers conferred on the court of probate, and such court must proceed and make such order as the judge of probate should have done.

1913 (2251). **Dower barred in three years.**—All proceedings or suits for dower, when the claim or rights of an alienee of the husband, or any one claiming under such alienee, are involved in such suit or proceedings, must be commenced within three years after the death of the husband, and not after.

Ridgeway v. McAlpine, 31 Ala. 458; Owen v. Campbell, 32 Ala. 521; Boynton v. Sawyer, 35 Ala. 497; Slatter v. Meek, Ib. 528; Martin v. Martin, Ib. 560; Barksdale v. Garrett, 64 Ala. 277.

CHAPTER 4.

RIGHT OF ALIENS TO TAKE, HOLD AND TRANSMIT PROPERTY.

1914 (2860). **Aliens may take, hold and transmit property.** An alien, resident or non-resident, may take and hold property, real and personal, in this state, either by purchase, descent, or devise, and may dispose of, and transmit the same by sale, descent, or devise, as a native citizen.

TITLE IV.

ESTATES OF DECEDENTS.

CHAPTER 1 —Descents, distributions and escheats.
2.—Wills.
3.—Grant of letters testamentary and of administration.
4.—Appointment of non-residents as executors and administrators, and special provisions in relation to them.
5.—Removal, resignation and requiring additional bonds of executors and administrators; appointment of administrators de bonis non; proceedings on discovery of will after grant of letters.
6.—Collection of decedent's personal property; inventory and appraisement; notice of appointment.
7.—Payment and settlement of debts, and presentation of claims; renting of real estate, and sales of property.
8.—Settlements of administrations; distribution of estates.
9.—Keeping estates together.
10.—Insolvent estates.
11.—Suits by and against executors and administrators, and enforcement of judgments and decrees; administrators ad litem; authority of foreign executors and administrators to sue for and recover or receive property.
12.—Sale and partition of partnership lands in which a decedent had an interest as partner.

CHAPTER 1.

DESCENTS, DISTRIBUTIONS AND ESCHEATS.

ARTICLE 1.—General provisions
2.—Advancements.
3 —Escheats.

ARTICLE I.

GENERAL PROVISIONS.

1915 (2252). **Descent of real estate.**—The real estate of persons dying intestate as to such estate descends, subject to the payment of debts, charges against the estate and the widow's dower, as follows:

1. To the children of the intestate, or their descendants, in equal parts.

2. If there are no children, or their descendants, then to the brothers and sisters of the intestate, or their descendants, in equal parts.

3. If there are no children, or their descendants, no brothers or sisters, or their descendants, then to the father, if living; if not, to the mother.

4. If there are no children, or their descendants, no brother or sister, or their descendants, no father or mother, then to the next of kin to the intestate, in equal degree, in equal parts.

5. If there are no children, or their descendants, no brother or sister, or their descendants, no father or mother, or next of kin, capable of inheriting, the whole estate goes to the husband or wife of the intestate, if capable of taking; and if there is no husband or wife, it escheats to the state.

Statutory system complete; its purpose.—Stallworth v. Stallworth, 29 Ala. 76. **Persons entitled to take.**—Tannis v. Doe, 21 Ala. 449; Etheridge v. Malempre, 18 Ala. 565. **Right of state to enact laws of descent.**—Etheridge v. Malempre, 18 Ala. 565. **Property held in trust does not descend.**—Maury v. Mason, 8 Port. 211. **Property descends, though contrary to intention of decedent, unless expressed by will.**—Denson v. Autrey, 21 Ala. 205. **Personal estate descends according to laws of domicil.**—Johnson v. Copeland, 35 Ala. 521; Goodman v. Winter, 64 Ala. 410. **But real estate, according to laws of this state.**—Grimball v. Patton, 70 Ala. 626. **Under subdivision 2.**—Hitchcock v. Smith, 3 Stew. & Port. 29. **Under subdivision 3.**—Fowler v. Trewhitt, 10 Ala. 622. **Under subdivision 4.**—Delaney v. Walker, 9 Port. 497; Phillips v. Peteet, 35 Ala. 696.

1916 (2253). **Lineal descendants take ancestor's share.** Under the provisions of the preceding section, the lineal descendants, in equal degree, represent their ancestor; that is, the children of a deceased child, brother, or sister of the intestate are entitled to inherit, in equal parts, the same share that such deceased child, brother, or sister would have inherited, if living; the grandchildren of such deceased child, brother, or sister, taking in equal parts the same share that their parents would have inherited, if living.

Hitchcock v. Smith, 3 Stew. & Port. 29; Stallworth v. Stallworth, 29 Ala. 76.

1917 (2254). **No representation among collaterals; exception.**—There is no representation among collaterals, except with the descendants of the brothers and sisters of the intestate.

1918 (2255). **Kindred computed by civil law.**—The degree of kindred must be computed according to the rules of the civil law.

Johnson v. Copeland, 35 Ala. 521; Phillips v. Peteet, Ib 696.

1919 (2256). **No distinction made against heirs of half blood; exceptions.**—There is no distinction made between the whole and the half blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift from or of some one of his ancestors; in which case all those who are not of the blood of such ancestor are excluded from the inheritance as against those of the same degree.

McLemore v. McLemore, 8 Ala. 687; Stallworth v. Stallworth, 29 Ala. 76; Johnson v. Copeland, 35 Ala. 521.

1920 (2257). **Posthumous children.**—Posthumous children of the intestate inherit as if born in his life-time; but no right of inheritance accrues to any other person than the children of the intestate, unless born at his death.

Bishop v. Hampton, 11 Ala. 254.

1921 (2258). **Bastards.**—Every illegitimate child is considered as the heir of his mother, and inherits her estate in whole or in part, as the case may be, in like manner as if born in lawful wedlock.

Lingen v. Lingen, 45 Ala. 410.

1922 (2259). **Who inherit from illegitimate child.**—The mother, or kindred of an illegitimate child on the part of the mother are in default of children of such illegitimate child, or their descendants, entitled to inherit his estate.

1923 (2273). **Heirs take as tenants in common.**—When an inheritance, or share of an inheritance descends to several persons, they take as tenants in common, in proportion to their respective rights, unless it is otherwise provided by law.

1924 (2261). **Distribution of personal estate.**—The personal estate of persons dying intestate as to such estate, after the payment of debts and charges against the estate, is to be distributed in the same manner as his real estate, and according to the same rules; except that the widow, if there are no children, is entitled to all the personal estate, or, if but one child, she is entitled to one-half; if more than one, and not more than four children, to a child's part; and if more than four children, to one-fifth.

Adultery of wife no bar under act of 1812 —Turner v. Cole, 24 Ala. 364.

ARTICLE II.

ADVANCEMENTS.

1925 (2262). **Advancements deducted in division and distribution.**—Any estate, real or personal, which has been given by any intestate in his life-time, as an advancement to any child, or other lineal descendant, must be considered as part of the estate, so far as regards the division and distribution thereof among his children or their descendants, and must be taken by such child or descendant towards his share of the estate of the deceased.

Taylor v. Reese, 4 Ala. 121; Mitchell v. Mitchell, 8 Ala. 414; Walks v. Greer, 14 Ala. 437; Butler v. M. Ins. Co., Ib. 777; Andrews v. Hall, 15 Ala. 85; Logan v. Logan, 13 Ala. 653; Wilson v. Wilson, 18 Ala. 176; Smith v. Smith, 21 Ala. 761; Grey v. Grey, 22 Ala. 233; Krebs v. Krebs, 35 Ala. 293; Greene v. Speer, 37 Ala. 532; Merrill v. Rhodes, Ib. 449; Autrey v. Autrey, Ib. 614; Cawlfield v. Brown, 45 Ala. 552; Coleman v. Smith, 55 Ala. 368; Clements v. Hood, 57 Ala. 459; Fennell v. Henry, 70 Ala. 484.

1926 (2263). **Rule when advancement exceeds, or is less than share.**—If the amount of such advancement is equal to or exceeds the share of the heir so advanced, he is excluded from any further portion in the division and distribution of the estate, but he is not required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to as much more as will give him a full share of the estate of the intestate.

See citations to preceding section.

1927 (2264). **If made in real or personal estate, considered part of such estate.**—If the advancement is made in real estate, the value thereof, for the purposes of the preceding section, is to be considered as part of the real estate to be divided; and if it is made in personal property, it is to be considered as part of the personal estate to be distributed; and if in either case it exceeds the share of real or personal estate to which the heir, child, or descendant so advanced would have been entitled, he is not required to refund any part of it, but receives so much less out of the other part of the estate as will make his whole share equal to those of the other heirs in the same degree.

1928 (2265). **How value determined.**—If the value of the estate, real or personal, is expressed in the conveyance, or in the

charge thereof made by the intestate, or in the receipt given by the person receiving such advancement, it is to be considered as of that value in the division and distribution of the estate; otherwise, it is estimated according to its value when given.

Wilks v. Greer, 14 Ala. 437; Turner v. Kelly, 67 Ala. 173.

1929 (2266). **Descendant of party receiving advancement takes subject thereto.**—If any child or other lineal descendant so advanced die before the person making such advancement, leaving descendants or other heirs, such advancement must be taken into consideration in the division and distribution of the estate; and the amount thereof must be allowed accordingly by the representatives of the heir so advanced as so much received towards their share of the estate, as if the advancement had been made directly to them.

Wilson v. Wilson, 18 Ala. 176; Wheat v. Wheat, 24 Ala. 429

1930 (2267). **What not an advancement.**—Maintaining, educating, or giving money to a child or other lineal descendant, without intending it as a portion or settlement in life, is not an advancement.

See citations to section 1925.

1931 (2268). **Controversy as to advancements; how issue made up and tried.**—Controversies as to advancements are cognizable before the probate court, on the application, either of a party who has received an advancement, or of a party in interest, who alleges that an advancement has been made; and upon demand of either party, an issue in writing shall be made up under the direction of the court, and tried by a jury as in other cases of contested fact.

Mitchell v. Mitchell, 8 Ala. 414; Andrews v. Hall, 15 Ala. 86; Wilson v. Wilson, 18 Ala. 176; Smith v. Smith, 21 Ala. 761; Gaillard v. Duke, 57 Ala. 619.

1932 (2269). **Discovery of advancements.**—Pending administration of an estate, on the application of the executor or administrator, or some one interested in the estate, to the probate court where the administration is, alleging on oath that an advancement had been made by the decedent, and that the value of such advancement is not expressed in any conveyance or receipt, within the applicant's knowledge, or in any charge made by the decedent, the judge of probate must issue citation to the distributee or heir alleged to have received such advancement, requiring him, within a specified time, not less than thirty, nor more than sixty days, to report on oath a list of the property received, the time when, and the value of the same when received, or to deny on oath having received any advancement from the decedent. If the party alleged to have received the advancement is a non-resident of the state, notice must be given by publication once a week for three successive weeks in some newspaper published in the county, or if no paper is published in the county, then in one published in an adjoining county, requiring him to answer within a specified time, not less than forty, nor more than ninety days.

1933 (2270). **Proceedings and answer on death of distributee.**—In case of the death of any distributee or heir alleged to have received advancements, his legal representatives or heirs at law shall be required to report or answer in the

same manner as set forth in the preceding section; and if they are residents of this state, notice must be given by citation, and if non-residents, by publication, as provided for in cases embraced in the preceding section; and if any of the heirs at law of such deceased distributee or heir are minors, or persons of unsound mind, the probate court must appoint a suitable guardian ad litem for them, who shall deny the allegations contained in such application, and demand proof thereof.

1934 (2271). **Contest of answer; hearing and notice.** Upon the rendition of the report or answer of the distributee or heir alleged to have received an advancement, or of his legal representatives or heirs, if deceased, if the executor or administrator, or any of the parties interested in such estate are not satisfied with the report or answer, on the ground that the same does not set forth all the property received or advanced, or does not set forth the true value of the property at the time it was received or advanced, or is not satisfied that the report or answer is true, then, in either case, such party may file objections thereto, stating the grounds of the objections, and the judge of probate must set a day, at such time as he may think proper, for hearing and determining, according to the evidence, as to the amount of property advanced, the time when advanced, and its value when received; and he must give all the parties interested notice of such objections, and of the time set for hearing the same, by citation, if residents of this state, or if non-residents, by publication in some newspaper published in the county, or if no paper is published in the county, then in one published in an adjoining county, once a week for three successive weeks.

1935 (2272). **Consequence of failure to answer.**—In case any distributee or heir, or the legal representatives or heirs at law of any distributee or heir alleged to have received an advancement, and on whom a citation has been personally served as above provided, fail or neglect to return a report, as required, or fail to answer such application, denying that he has received any advancement, such failure or neglect to report or answer shall be considered by the probate court as prima facie evidence that such person has received his full proportionate part of such estate; and in case any non-resident against whom publication has been made fails or neglects to return a report, as required, or to answer such application, denying that he has received any advancement, the court may proceed to take evidence ex parte as to the matters alleged in such application.

Taylor v. Reese, 4 Ala. 121; Green v. Speer, 37 Ala. 532.

ARTICLE III.

ESCHEATS.

1936 (2851). **When property escheats.**—The property of all persons who die without devising or bequeathing the same, and leaving no lawful heirs, or husband or wife, capable of taking, or where the devisees or legatees are incapable of taking the same, and there are no lawful heirs, escheats to the state.

1937 (2852). **Notice by representative.**—The personal rep-

resentative of any person leaving property not devised or bequeathed, or where the devisees or legatees are incapable of taking, and such representative is unable to ascertain any lawful heirs or distributees, or persons capable of taking, within six months after the grant of letters testamentary or of administration, must give notice thereof in some newspaper published in the state, once a week for three successive weeks.

1938 (2853). **Contents of notice.**—Such notice must contain the name of the deceased, as near as may be, a description of his person, the place where he was, or is supposed to have been born, the place where he died, or was known to reside, and a description of the property of which he died seized or possessed.

1939 (2854). **Disposition of personalty when no heir appears.**—If no heir or person entitled to receive such estate appears or is ascertained within twelve months after such publication, the money and proceeds of the personal assets must be paid to the judge of probate, after deducting the expenses of administration.

1940 (2855). **Disposition of real estate when no heir appears.**—If, after two years from the publication of such notice, no heir or person entitled to receive such estate appears, the real estate must be sold by such personal representative, under the direction of the judge of probate of the county in which letters testamentary or of administration were granted, and upon such notice as real estate is sold by executors and administrators; and the proceeds thereof must, after deducting all expenses and allowances, be paid to such judge.

1941 (2856). **Decrees against representative for failure to pay over proceeds.**—The judge of probate may render decrees against such personal representative, in the name of the state, for the money or proceeds of the property, under the provisions of this article, and enforce the same as other decrees by the judge of probate against executors or administrators are enforced.

1942 (2857). **Receipts paid to state treasurer; penalty for, and evidence of default.**—The judge of probate must, within three months after the receipt thereof, pay to the state treasurer all moneys he may receive under the provisions of this article, and, failing so to do, he is liable as a defaulter, and also forfeits three hundred dollars, one-half to the state, and the other half to any one suing for the same; and, on the trial, the certificate of the treasurer is presumptive evidence of his failure to make such payment.

1943 (2858). **State's remedy on distribution of property without authority.**—The state may enforce its right to any personal property to which it is entitled under the provisions of this article, by action against any person into whose possession the same may come; and, if any personal representative pays any money, or delivers any property to which the state is, under the provisions of this article, entitled, to any person not authorized to receive the same, such personal representative and his sureties are liable to the state for the amount of such money, or value of such property, and interest thereon from the time of such payment or delivery.

1944 (2859). **Duty of judge of probate.**—It is the official

duty of the judge of probate of each county to attend to the interest of the state, intended to be secured by the provisions of this article.

CHAPTER 2.

WILLS.

ARTICLE 1.—General provisions.
2.—Execution and probate of wills.
3.—Contesting the validity of wills.

ARTICLE I.

GENERAL PROVISIONS.

1945 (2274). **Who may devise lands.**—Every person of the age of twenty-one years, of sound mind, may, by his last will, devise his lands, tenements, or hereditaments, or any interest therein, descendible to his heirs.

1946 (2275). **To whom devises may be made.**—A devise of lands, tenements, or hereditaments may be made to any person or corporation capable by law of holding real estate.

Carter v. Balfour, 19 Ala. 814; Williams v. Pearson, 38 Ala. 299; Ala. Conference v. Price, 42 Ala. 39; Gilmer v. Gilmer, Ib. 9.

1947 (2276). **Descent of realty, when devisee incapable of taking.**—Any estate or interest in real property, devised to a person or corporation incapable of taking, descends to the nearest of kin capable of taking, or, if the testator has no heirs competent to take, to the residuary devisee, if any is named in the will capable of holding such estate or interest; otherwise, to the husband or wife; otherwise to the state.

Carter v. Balfour, 19 Ala. 814; Williams v. Pearson, 38 Ala. 299.

1948 (2277). **What passes by general devise.**—Every devise, made by a testator, in express terms, of all his real estate, or in any other terms denoting his intention to devise all his real property, must be construed to pass all the real estate he was entitled to devise at the time of his death.

1949 (2278). **What estate in lands passes.**—Every devise of land must be construed to convey all the estate of the devisor therein, unless it clearly appears from the will that he intended to convey a less estate.

1950 (2279). **Character of estate pur autre vie.**—An estate during the life of a third person, whether limited to his heirs or otherwise, is a freehold only during the life of the grantee or devisee; but after his death it is a chattel real.

1951 (2280). **Who may bequeath personal property.**—All persons over the age of eighteen years, of sound mind, and no others, may also, by their last will, dispose of all their personal property.

Daniel v. Hill, 52 Ala. 430.

1952 (2281). **Property not disposed of distributed as in case of intestacy.**—All property not disposed of by will must

be administered and distributed, as in case of intestacy, by the executor or the administrator with the will annexed.

McLeod v. McLeod, 6 Ala. 236; Bell v. Martin, 10 Ala. 334; Eddings v. Long, Ib. 203; Wheat v. Wheat, 24 Ala. 442; Green v. Spear, 37 Ala. 532.

1953 (2282). **When will revoked by marriage and issue.** If, after making any will disposing of his whole estate, the testator marry and have issue of such marriage, born either in his life-time, or after his death, and the wife or such issue is living at his death, such will must be deemed revoked, unless provision has been made for such issue by some gift or settlement, or unless such issue has been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence can be received for the purpose of rebutting the presumption of such revocation.

1954 (2283). **Woman's marriage revokes her will.**—If, after the making of a will by an unmarried woman, she marries, the marriage operates as a revocation of the will.

1955 (2284). **When child born after will takes as in case of intestacy.**—Whenever a testator has a child, born after the making of his will, either in his life-time or after his death, and no provision is made in the will in any way for such a contingency, such birth operates as a revocation of the will, so far as to allow such child to take the same share of the estate of the testator as if he had died intestate.

1956 (2285). **Manner of setting apart such child's portion.** The portion which such child is entitled to recover and receive, under the provisions of the preceding section, shall be taken and recovered from the estate of the testator, and from the parts of devisees and legatees, as follows:

1. If there be any real or personal estate of the testator, which has not been devised or bequeathed by his will, and there are other children, or the descendants of other children, capable of taking the same by descent, and a widow, or any of them, the share of such child, which it would take by descent or by distribution, with such widow and other heirs, or any of them, must be applied towards the payment of the portion of such child; and if there are no other children, or the descendants of other children, the whole of such part of the real or personal estate, or so much thereof as may be necessary, must be applied to the payment and discharge of such portion.

2. If the same is insufficient to pay and discharge such portion, then any part of such estate which would have gone to the residuary legatees of the testator, other than the widow, or any of his children, or so much of such part of the estate as may be necessary, must be taken and applied to the payment of such portion.

3. If such portion be not thus paid and satisfied, the same, or the balance thereof, must be taken from the devisees and legatees of the testator, in proportion to the value of what they would respectively be entitled to receive under the will.

1957 (2286). **If child die before receiving its portion, it passes by will.**—If any such child die before receiving its portion, without descendants, such portion, or so much thereof as has not been received, passes by the will, as if such child had not been born.

1958 (2287). **When devise not revoked by contract for conveyance of property devised.**—When any testator, after making his will, makes any contract for the conveyance of any property devised in such will, and the whole or any part of the purchase-money remains unpaid to such testator at his death, the disposition of the property by such contract is not a revocation of the devise, at law or in equity, unless it clearly appears by the contract, or some other instrument in writing, to be intended as a revocation; and such property passes to such devisee, subject to the same remedies for a specific performance thereof, in favor of the persons entitled thereto, against the person to whom such devise was made, as might be had at law or in equity against the heirs of the testator, had the same descended to them; and the purchase-money, when recovered by the executor of the testator, must be paid to the devisee of such property.

Powell v. Powell, 30 Ala. 697; Taylor v. Kelly, 31 Ala. 59; Stubbs v. Houston, 33 Ala. 555; Welch v. Pounders, 36 Ala. 668.

1959 (2288). **When devise not revoked by subsequent charge or incumbrance.**—A charge or incumbrance on any real or personal property, to secure any money, or the performance of any contract, does not operate as a revocation of any devise or bequest of such property previously executed, unless it appears from the will, or the instrument creating such charge or incumbrance, that such was the intention of the testator.

See citations to preceding section.

1960 (2289). **When after-acquired interest passes under devise.**—When any testator, after having executed a will devising any real property, afterwards makes a conveyance of his interest, and acquires a new estate therein, such new estate passes by his will to the person to whom the original estate or interest was devised, unless it appears from the will, or the instrument conveying the estate, or by which the new estate was acquired, that the testator intended such conveyance to operate as a revocation.

1961 (2290). **Effect of death on devise or legacy to child or descendant.**—When any estate, real or personal, is devised or bequeathed to a child or other descendant of the testator, and such devisee or legatee dies in the life-time of the testator, leaving a child or other descendant surviving the testator, such legacy does not lapse, but vests in such child or other descendant, as if such devisee or legatee had survived the testator, and died intestate.

Jones v. Jones, 37 Ala. 646.

1962 (2291). **When debtor not released by being appointed executor.**—The appointment of a debtor as an executor is not a discharge of the debt, unless it is so directed in the will.

1963 (2292). **Dissent by widow; her rights on.**—The widow may, in all cases, dissent from the will of her deceased husband, and, in lieu of the provision made for her by such will, take her dower in the lands, and such portion of the personal estate as she would have been entitled to in case of intestacy.

Right of dissent personal to the widow.—Donald v. Portis, 42 Ala. 29; Crenshaw v. Carpenter, 69 Ala. 572. **Dissent unnecessary when no provision for her in will.**—Green v. Green, 7 Port. 19; Martin v. Martin, 22 Ala. 86; Turner v. Cole, 24 Ala. 364; Martin v. Martin, 35 Ala. 560. **Effect of dissent, etc.**—Gaunt v. Tucker, 18 Ala. 27; Kirkman v. Mason, 17 Ala. 134; Vaughan v. Vaughan, 30

Ala. 329; Adams v. Adams, 39 Ala. 274; Dean v. Hart, 62 Ala. 308; Steele v. Steele, 64 Ala. 438. **Change effected by statute.**—McLeod v. McDonald, 6 Ala. 236.

1964 (2293). **Dissent; when to be made.**—Such dissent must be made in writing, and deposited, within eighteen months from the probate of the will, with the judge of probate of the county in which the will is probated; and an entry must be made of record, specifying the day on which the dissent was made.

McGrath v. McGrath, 38 Ala. 246.

Dec. 3, 1884, p. 74.

1965. How dissent, made if widow insane or minor, or is dead.—If the widow is insane, or under the age of twenty-one years, or dies, upon a petition filed by her guardian or next friend, or, if dead, by her personal representative, within the time prescribed by the preceding section, alleging that it would be to her interest, or, in case of her death, to the interest of her estate, to dissent from the will of her husband, the probate court of the county in which the will is probated has authority to declare dissent from such will for her; and upon the filing of such petition, the court must appoint a day for the hearing, not more than twenty days from the filing thereof, and if the widow is insane, or under the age of twenty-one years, a guardian ad litem must be appointed for her. If upon the hearing the court is satisfied, from the testimony of at least two disinterested witnesses, taken by deposition upon interrogatories as in chancery cases, that it is to the interest of such widow, or, in case of her death, of her estate, to dissent from the will, an order shall be made declaring such dissent. The costs of the proceedings must be paid by the person filing the application.

ARTICLE II.

EXECUTION AND PROBATE OF WILLS.

1966 (2294). **Wills to be in writing; how signed and attested.**—No will is effectual to pass real or personal property, except in the cases hereinafter provided for, unless the same is in writing, signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.

Signature to will.—Armstrong v. Armstrong, 29 Ala. 538; Woodcock v. McDonald, 30 Ala. 411; Bailey v. Bailey, 35 Ala. 687; Riley v. Riley, 36 Ala. 496. **Witnesses and attestation.**—Leverett v. Carlisle, 19 Ala. 80; Hill v. Barge, 12 Ala. 687; Ex parte Henry, 24 Ala. 638; Hoffman v. Hoffman, 26 Ala. 535; Woodcock v. McDonald, 30 Ala. 411; Riley v. Riley, 36 Ala. 496; Mosser v. Mosser, 32 Ala. 551; Hall v. Hall, 38 Ala. 131; Kumpe v. Coons, 63 Ala. 448. **By what law validity of will determined.**—Powell v. Powell, 30 Ala. 697. **When paper not operative as will of personal property.**—Boling v Boling, 22 Ala. 826.

1967 (2295). **Subsequent incompetency of witnesses; effect of.**—If the witnesses attesting the execution of any will are competent at the time of their attestation, their subsequent incompetency, from whatever cause it may arise, must not prevent the probate of such will, if otherwise satisfactorily proved.

1968 (2296). **Revocation of wills; how made.**—Except in the cases provided in the preceding article, a will in writing can only be revoked by burning, tearing, canceling, or obliterating

the same, with the intention of revoking it, by the testator himself, or by some person in his presence, and by his direction, or by some other will in writing, or some other writing, subscribed by the testator, and attested as prescribed in the first section of this article; and when any will is burned, torn, canceled, or obliterated by any other person than the testator, his direction and consent thereto, and the fact of such burning, canceling, tearing, or obliteration, must be proved by at least two witnesses.

Weeks v. McBeth, 14 Ala. 474; Taylor v. Kelly, 31 Ala 59; Stubbs v. Houston, 33 Ala. 555; Welsh v. Pounders, 36 Ala. 668; Barker v. Bell, 46 Ala. 216; s. c., 49 Ala. 284.

1969 (2297). **Former will not revived by revocation; exceptions.**—The making of any subsequent will or writing, and the cancellation, destruction, or revocation thereof do not revive any will previously executed, unless it appear, by the terms of such revocation, that it was the intention of the testator to revive and give effect to the first will; or unless, after such cancellation or destruction, he duly republish the previous will.

1970 (2298). **Unwritten wills of personal property; when valid.**—An unwritten will of personal property is valid only when the property bequeathed thereby does not exceed in value five hundred dollars.

Erwin v. Hamner, 27 Ala. 296.

1971 (2299). **Circumstances under which such will may be made.**—Such unwritten will, to be valid, must be made during the last sickness of the deceased, and at his dwelling, or where he had resided ten days or more, except when he was taken sick from home and died before his return; and it must be proved that the testator, at the time of making the same, called upon the persons present, or some of them, to take notice, or bear witness, or to that effect, that such was his will.

Sykes v. Sykes, 2 Stew. 364; Johnson v. Glasscock, 2 Ala. 218

1972 (2300). **Soldiers, seamen and mariners may make wills as heretofore.**—No provision in this article must be construed to prevent soldiers in actual military service, or mariners or seamen at sea, from disposing of their personal property as they might have done before the adoption of this Code.

1973 (2301). **When and on what notice unwritten wills probated.**—No unwritten will can be probated, or letters testamentary granted thereon, until after fourteen days from the death of the testator, nor until a citation has been served on the widow and next of kin to appear and contest such will, unless it is shown that such widow and next of kin are out of the state, in which case notice must be given by publication, once a week for three successive weeks, in some newspaper published in the county, or if none is published therein, in the one nearest to the court-house thereof; and no such will must be established until it is proved that such notice has been given.

Gilbert v Gilbert, 22 Ala 529; Bradley v. Andress, 27 Ala. 596; Kirby v. Kirby, 40 Ala 492.

1974 (2302). **When must not be proved.**—After the expiration of six months from the time of making an unwritten will, no testimony must be received to prove the same, unless the

words, or the substance thereof, was reduced to writing within six days after making of the same.

1975 (2303). **Who may have will probated.** — Upon the death of a testator, any executor, devisee, or legatee named in the will, or any person interested in the estate, may have the will proved before the proper probate court.

McGrew v. McGrew, 1 Stew. & Port. 30.

1976 (2304). **In what court will to be proved.**—Wills must be proved in the several probate courts as follows:

1. When the testator, at the time of his death, was an inhabitant of the county, in the probate court of such county.

2. When the testator, not being an inhabitant of the state, dies in the county, leaving assets therein, in the probate court of such county.

3. When the testator, not being an inhabitant of the state, dies out of the county, leaving assets therein, in the probate court of the county in which such assets, or any part thereof, are.

4. When the testator, not being an inhabitant of the state, dies, not leaving assets therein, and assets thereafter come into any county, in the probate court of any county into which such assets are brought.

Subdivision 1.—Herbert v. Hanrick, 16 Ala. 581; Merrill v. Morrissett, 76 Ala. 433 **Subdivision 2.** — Jaques v. Horton, 76 Ala. 238. **Nature of jurisdiction.** Herbert v. Hanrick, 16 Ala. 581; Hall v. Hall, 47 Ala. 290; Goodman v Winter, 64 Ala. 410; Acklen v. Goodman, 77 Ala. 521. **Necessity of probate.**—Hawkins v. Dumas, 41 Ala. 391; Goodman v. Winter, 64 Ala. 410; Jordan v. Jordan, 65 Ala. 301; Desribes v. Wilmer, 69 Ala. 25. **Conclusiveness of probate.**—Matthews v. McDade, 72 Ala. 377; Goodman v. Winter, 64 Ala. 410; Brock v. Frank, 51 Ala 85. **Probate of lost or destroyed will.**—McBeth v. McBeth, 11 Ala. 596; Apperson v. Cottrell, 3 Port. 51; Jaques v. Horton, 76 Ala. 238. **Probate of foreign will.** Pope v. Pickett, 51 Ala. 584; Goodman v. Winter, 64 Ala 410; Varner v. Bevil, 17 Ala. 286. **Effect of foreign probate.**—Moore v. Lewis, 21 Ala. 580. **Meaning of "inhabitant."**—Merrill v. Morrissett, 76 Ala. 433. **Nature of proceedings.**—Deslonde v. Darrington, 29 Ala. 92. **Written application, though proper, not necessary.** Deslonde v. Darrington, 29 Ala. 92.

1977 (2305). **Proceedings to compel production of will; penalty.**—On application to the probate court of the proper county by any person interested, duly verified by affidavit, the judge of such court must issue a citation to any person alleged to have the custody or possession of any last will, requiring such person to produce the same before such judge on a certain day, to be specified in such citation; and any person who, after service of such citation upon him, fails to produce such will, or to make an affidavit according to the provisions of the next section, by the day specified in such citation, may be committed to jail until he produces such will, makes such affidavit, or is otherwise discharged by law; and he is also liable to all persons interested for all damages caused by withholding such will.

1978 (2306). **When party proceeded against, discharged.** Such person must not be committed to jail, if he makes and files an affidavit that such will was never in his possession, or that he parted with the same before the service of such citation, to some person whose name he must state, entitled to the custody thereof, in good faith, and without any intention to delay or defeat the probate thereof; or that he has casually lost or mislaid the same, and has made diligent search therefor without success.

1979 (2307). **Mode of proving wills not nuncupative.**

Wills offered for probate, except nuncupative wills, must be proved by one or more of the subscribing witnesses, or if they be dead, insane, or out of the state, or have become incompetent since the attestation, then by the proof of the handwriting of the testator, and that of at least one of the witnesses to the will.

1980 (2308). **What necessary to probate by proof of handwriting.**—If none of the subscribing witnesses to such will are produced, their insanity, death, subsequent incompetency, or absence from the state must be satisfactorily shown, before proof of the handwriting of the testator, or of any of the subscribing witnesses can be received.

1981 (2309). **When proof taken by deposition.**—When the subscribing witnesses, or any of them, reside out of the state, the judge of probate may issue a commission to take the testimony of such witnesses in proof of such will.

1982 (2310). **Testimony to be recorded with will.**—If it appears, on the proof taken before the judge of probate, that the will was duly executed, the testimony of the witnesses must be reduced to writing by him, signed by the witnesses, and, with the will, recorded in a book provided and kept for that purpose.

1983 (2311). **Certificate indorsed on will; contents.**—Every will so proved must have a certificate indorsed thereon, setting forth, in substance, that such will has been duly proved and recorded, with the proof; specifying, also, the date of the probate, the book in, and page or pages on which it is recorded; which indorsement must be signed by such judge of probate.

Hall v. Hall, 47 Ala. 290.

1984 (2312). **When may be read in evidence.**—Every will, so proved and indorsed, may be read in evidence in any court of the state, without further proof thereof; and the record of such will and proof, or a transcript thereof, certified by the judge of probate, must be received as evidence to the same extent as if the original will was produced, and the same proof made.

1985 (2313). **How will proved out of, probated in this state.** When the testator was not, at the time of his death, an inhabitant of this state, and his will has been duly proved in any other state or country, it may be admitted to probate in the proper court of this state, in the manner following:

1. If the will has been admitted to probate out of this state, but within the United States, such will, or a copy of the same, and the probate thereof, must be certified by the clerk of the court in which the same is proved, with the certificate of the judge, or one of the judges of such court, that the attestation is genuine, and by the proper officer; and if the will is proved before a court not having a clerk, or before an officer who is his own clerk, the certificate of the judge of such court or officer, stating such fact, is sufficient.

2. If the will has been admitted to probate out of the United States, such will, or a copy of the same, with the probate thereof, must be certified by the clerk, or other officer, by whatever name called, of the court in which the will was proved, with the certificate of the judge, or one of the judges of such court, that the attestation is genuine; and if the will is proved before a court having no clerk, or an officer who is his own clerk, the

judge of such court or officer must so certify, and in that case the attestation must be certified to be genuine by the judge of any court of record, or the mayor or chief magistrate of any town, city, county, or borough, or by any diplomatic, consular, or commercial agent of the United States.

Puryear v Beard. 14 Ala. 121; Broughton v. Bradley, 34 Ala 694; Ward v. Oates, 43 Ala. 515; Brock v. Frank, 51 Ala. 85; Goodman v. Winter, 64 Ala. 410.

1986 (2314). **When will may be withdrawn for proof out of state.**—Whenever any will has been proved and recorded for six months in any county of this state, as required by this article, and such will is required to be proved out of this state, the judge of probate may, on the application of the executor, duly sworn to, allow him to withdraw the will.

1987 (2315). **Notice of application to prove will.**—Whenever an application is made to prove a will in this state, at least ten days' notice must be given to the widow and next of kin, or to either of them, residing and being within the state, before such application is heard.

Shields v. Alston, 4 Ala. 248; Hilliard v. Binford, 10 Ala 977; Lees v. Browning, 15 Ala. 495; Ray v. Segrist. 19 Ala. 811; Stapleton v. Stapleton. 21 Ala. 587; Walker v. Jones, 23 Ala. 448; Blakley v. Blakley, 33 Ala. 611; Leslie v. Sims 39 Ala. 161; Clemens v. Patterson, 38 Ala. 721; Allen v. Prater, 35 Ala. 169; Sowell v Sowell, 41 Ala. 359; Hall v. Hall, 47 Ala. 290.

As amended, Feb. 28, 1887, p. 147.

1988 (2316). **Notice by publication.**—If either the widow or next of kin reside and are without the state, notice of such application must be given by publication once a week for three successive weeks in a newspaper published in the county in which application is made, and if no paper is published therein, by posting notice of the same at the court-house three weeks before such application is heard.

ARTICLE III.

CONTESTING THE VALIDITY OF WILLS.

1989 (2317). **Contest; grounds, and by whom instituted; how issue made up and tried.**—A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objections thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury.

Matthews v. McDade, 72 Ala. 378; Jaques v. Horton, 76 Ala. 238.

1990 (2318, 2319, 2323). **Day fixed for trial; continuance; witnesses.**—Upon the institution of such contest, a day must be appointed for the trial thereof, and the trial may, on good cause shown by either party, be continued to any other day; and the judge of probate must, on application of either party, issue subpœnas for witnesses to appear on the day fixed for

such trial, and may re-summon them to any day to which the same may be continued.

1991 (2320, 2322). **Jury; how drawn, summoned, etc.**—The judge of probate must also, when trial by jury is demanded, direct the sheriff to summon such number of persons as a jury, to sit upon such trial, as may be necessary; or he must, if either party require it, cause fifteen persons to be drawn and summoned in the same manner as jurors are drawn and summoned for the circuit court; and if, out of the number summoned, a jury is not completed from any cause, it may be completed from the by-standers or other persons summoned.

Jaques v. Horton, 76 Ala. 239.

1992 (2321). **Fine for default by juror.**—If any of the persons summoned as jurors fail to attend, the judge must enter a conditional fine of twenty-five dollars against him, which must be made absolute, unless such person appears within thirty days after being served with a notice of such fine, and renders a good excuse for failing to attend.

1993 (2325). **Proceedings against defaulting witness.**—If any witness, being duly summoned, fails to attend, the judge of probate shall enter up a conditional fine against him, not exceeding fifty dollars, and shall thereupon issue a notice to such witness to appear at a term of said court, not more than thirty days from the date of such notice, and show cause why such fine should not be made absolute; and the proceedings thereafter shall be governed by the same rules, and such witness shall be subject to the same liabilities, except as to the amount of the fine, as are provided by law in cases of defaulting witnesses in the circuit court.

1994 (2324, 2326). **Depositions; rules of procedure.**—For the trial of such contest, depositions of witnesses may be taken in the like cases, for the same causes, and in the same manner, as depositions are taken in civil actions in the circuit court; and in all matters relating to the organization and impaneling of the jury, to the evidence, mode of proceeding, and investigation and determination of such contest, not specially provided for by this article, the court must proceed and be governed by the same rules and regulations, so far as applicable, as prevail in courts of law in civil cases.

McElroy v. McElroy, 5 Ala. 81; Roberts v. Trawick, 13 Ala. 68; Walker v. Jones, 23 Ala. 448; Ex parte Henry, 24 Ala. 638; Deslonde v. Darrington, 29 Ala. 92; Crow v. Blakey, 31 Ala. 728; Taylor v. Kelly, Ib. 59; Seale v Chambliss, 35 Ala. 19; Fountain v. Brown 38 Ala. 72; Leslie v. Sims, 39 Ala. 161; Matthews v. McDade, 72 Ala. 378; Jaques v. Horton, 76 Ala. 238.

1995 (2329). **Judgment on such contest.**—When the judgment of the probate court is against the validity of the will, the probate thereof must be rejected; otherwise, the will must be admitted to probate.

1996 (2331, 2332, 2335). **Costs of contest; how taxed and enforced.**—The costs of any contest under the provisions of this article must be paid by the party contesting, if he fails; otherwise, it must be paid by the plaintiff, or out of the estate, or in such proportion by the plaintiff, or out of the estate, as the court may direct; and for the costs directed to be paid by the plaintiff or defendant, execution may be issued as in other cases;

and the costs directed to be paid out of the estate may be collected as other claims against an estate are collected.

Bradley v. Andress, 30 Ala. 80; Henderson v. Simmons, 33 Ala. 291.

1997 (2327, 2328). **Change of venue; proceedings and trial when granted.**—At any time before the trial of such contest, either party may remove the same to another county by proceeding as is required in civil actions in the circuit court; and when an order for the removal of the trial of such contest is made, the judge of probate must transmit the will, subpœnas, and all other papers belonging, and a transcript of all the entries of record relating thereto, to the judge of the probate court of the county to which the trial is ordered to be removed; and such judge of probate must proceed to try the case in the same manner as prescribed for the judge of probate of the county from which it has been removed.

1998 (2330). **Judgment when change of venue granted.**—If the judgment is rendered in the probate court to which it has been removed, and no appeal is taken within thirty days thereafter, such judgment must be certified by the judge of such probate court, and the will and other papers be returned to the probate court from which the trial was removed; and the will must be probated or rejected in such probate court as such judgment may be for or against the validity of the will.

1999 (2333, 2334). **Costs certified and taxed, on change of venue.**—If, on the removal of the trial, the costs are directed to be paid out of the estate, a bill of costs must be made out by the judge of probate trying the same, and certified to the judge of probate of the county from which the trial was removed; and such bill of costs may be taxed by motion in the court in which the trial was had, and the same may be re-certified to such judge of probate.

2000 (2336). **Contest in chancery within five years.**—Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within five years after the admission of such will to probate in this state, contest the validity of the same by bill in chancery, in the district in which such will was probated, or in the district in which a material defendant resides.

Johnston v. Glasscock, 2 Ala. 218; Kennedy v. Kennedy, Ib. 571; Johnston v. Hainesworth, 6 Ala. 443; Hill v. Barge, 12 Ala. 687; Hardy v. Hardy, 26 Ala. 524 Hunt v. Acree, 28 Ala. 580; Woodcock v. McDonald, 30 Ala. 411; Copeland v. Copeland, 32 Ala. 512; Kumpe v. Coons, 63 Ala. 448.

2001 (2337). **Trial by jury; evidence taken on probate of will admissible.**—The chancery court may, in such case, direct an issue to be tried by a jury, and on the trial before the jury, or hearing before the chancellor, the testimony of the witnesses reduced to writing by the judge of probate, according to section 1982 (2310), is evidence to be considered by the chancellor or jury.

Hill v. Barge, 12 Ala. 687.

2002 (2338). **Infants and lunatics allowed longer time to contest.**—After the expiration of such five years, the validity of the will can only be contested by infants and persons of unsound mind, who are allowed five years from the termination of their respective disabilities; but in no case to exceed twenty years from the probate.

CHAPTER 3.

GRANT OF LETTERS TESTAMENTARY AND OF ADMINISTRATION.

2003 (2339). **Grant of letters testamentary.**—Whenever a will has been admitted to probate in this state, the judge of the court in which the will was probated may issue letters testamentary, according to the provisions of this chapter, to the persons named as the executors in such will, if they are fit persons to serve as such.

Ikelheimer v. Chapman, 32 Ala. 676; Wood v. Cosby, 76 Ala. 557.

2004 (2340). **Persons disqualified as executors.**—No person must be deemed a fit person to serve as executor who is under the age of twenty-one years, or who has been convicted of an infamous crime, or who, from intemperance, improvidence, or want of understanding, is incompetent to discharge the duties of the trust.

2005 (2369). **Form of letters testamentary.**—Letters testamentary may be substantially in the following form:

"The State of Alabama, } Court of Probate.
——— county. }

The will of —— —— having been duly admitted to record in said county, letters testamentary are hereby granted to ——— ———, the executor named in said will, who has complied with the requisitions of the law, and is authorized to take upon himself the execution of such will. Witness my hand, and dated this —— day of ——, 18—.

"—— ——, Judge of Probate."

2006 (2341). **If executors disqualified, administration granted.**—If the person named in the will as sole executor is, or if all the persons named therein as executors are, from any of the causes enumerated in the second preceding section, unfit to serve as executor or executors, letters of administration, with the will annexed, may be granted on the testator's estate, under the provisions of section 2011 (2346, 2347).

2007 (2342). **When married woman entitled to letters testamentary.**—No married woman is entitled to letters testamentary unless her husband consents thereto, by a writing signed by him and filed with the judge of probate; and, by giving such consent, he becomes responsible for her acts jointly with her.

Pistole v. Street, 5 Port. 64; Kavanaugh v. Thompson, 16 Ala. 817; Rambo v. Wyatt, 32 Ala. 363; English v. McNair, 34 Ala. 40.

2008 (2343). **On removal of disability, minor or married woman entitled to letters.**—If the disability of a person under age, or of a married woman, named as executor in any will, is removed before the administration of such will is completed, such person is entitled to supplementary letters testamentary, to be issued in the same manner as original letters, and shall thereupon be authorized to join in the execution of such will with the persons previously appointed.

2009 (2344). **Renunciation of right to act as executor; how made.**—Any person named as executor in a will may re-

nounce such appointment by appearing before the judge of probate and declaring such renunciation, which must be entered of record; or such person may renounce his appointment by an instrument in writing under his hand, and attested by a judge of probate, judge of the circuit or supreme court, or chancellor; and such instrument, so attested, must be filed in the office of the judge of probate of the county in which the will is probated.

Dunham v. Roberts, 27 Ala. 701; Sowell v. Sowell, 41 Ala. 359.]

2010 (2345). **On renunciation, etc., by one, letters granted to others named.**—If any person named as executor in the will renounces his appointment, or fails to apply for letters testamentary within thirty days after probate, and any other persons named therein as executors make application for such letters, and are fit persons to discharge the trust, letters testamentary must issue to them, if they comply with the other requisitions of the law.

2011 (2346, 2347). **Administration granted in stated order on failure of executor to apply, etc.**—If no person is named in the will as executor, or if they all renounce, or fail to apply within thirty days after probate, or are unfit persons to serve, the residuary legatee, or, if he fails to apply within such time, refuses to accept, or is unfit to serve, then the principal legatee is entitled to letters of administration with the will annexed; and if both residuary and principal legatees fail to apply within such time, refuse to accept, or are unfit to serve, then such letters may be granted to the same persons, and in the same order, as letters of administration are granted in cases of intestacy.

2012 (2348). **On death of sole or surviving executor, who entitled to administration.**—No executor of an executor can, as such, administer on the estate of the first testator; but on the death of a sole or surviving executor, letters of administration with the will annexed may be granted to the persons entitled thereto, as in any case in which a sole executor has renounced his appointment.

2013 (2349). **Letters of administration; by what court and in what county granted.**—Courts of probate, within their respective counties, have authority to grant letters of administration on the estates of persons dying intestate, as follows:

1. Where the intestate, at the time of his death, was an inhabitant of the county.

2. Where the intestate, not being an inhabitant of the state, died in the county, leaving assets therein.

3. Where the intestate, not being an inhabitant of the state, dies out of the county, leaving assets therein.

4. Where the intestate, not being an inhabitant of the state, dies, leaving no assets therein, and assets are afterwards brought into the county.

As amended, Feb. 13, 1879, p. 60.

5. Where the intestate, being an inhabitant of the state, dies, leaving no assets subject to administration in the county of his residence, and no administration has been granted in such county within three months after the death of the intestate, then administration may be granted in any county where the intestate leaves assets.

Jurisdiction of court to grant letters; nature of.—Savage v. Benham, 17 Ala. 119; Ikelheimer v. Chapman, 32 Ala. 676; Sims v. Boynton, Ib. 353; Bradley v.

Broughton, 34 Ala. 694; Gray v. Cruise, 36 Ala. 557; Langford v. Dunklin, 73 Ala. 594; Barclift v. Treece, 77 Ala. 528. **When grant of letters voidable merely.** Bradley v. Broughton, 34 Ala. 694; Watson v. Collins, 37 Ala. 558; Ex parte Maxwell, Ib. 362; Jennings v. Moses, 38 Ala. 402; Coltart v. Allen, 40 Ala. 155; Wolffe v. Eberlin, 74 Ala. 99; Barclift v. Treece, 77 Ala. 528. **When void.**—Gayle v. Pitts, 1 Stew. 429; Treadwell v. Rainey, 9 Ala. 59; Duncan v. Stewart, 25 Ala. 408; Coltart v. Allen, 40 Ala. 155. **Letters of administration presumptive evidence of death and intestacy.**—Sims v. Boynton, 32 Ala. 353. **Acts under void letters, without validity; but acts under voidable letters, valid.**—Floyd v. Clayton, 67 Ala. 265. **"Assets" includes lands.**—Bishop v. Lalouette, 67 Ala. 197. **Grants under second subdivision.**—Gayle v. Pitts, 1 Stew. 429; Childress v. Bennett, 10 Ala. 75; Miller v. Jones, 26 Ala. 247; Bradley v. Broughton, 34 Ala. 691; Bishop v. Lalouette, 67 Ala. 197. **Right cannot be delegated.**—Curtis v. Williams, 33 Ala. 570.

2014 (2350). **Order of grant of administration.**—Administration of an intestate's estate must be granted to some one of the persons herein named, if willing to accept, and fit to serve, in the following order:

1. The husband or widow.
2. The next of kin entitled to share in the distribution of the estate.
3. The largest creditor of the intestate residing within this state.
4. Such other person as the judge of probate may appoint.

Right of widow to letters.—Dunham v. Roberts, 27 Ala. 701; Williams v. McConnico, Ib. 572; English v. McNair, 34 Ala. 40. **Discussion of husband's right under former statute.**—Randall v. Shrader, 17 Ala. 333. **Father entitled in preference to brothers and sisters.**—Brown v. Hay, 1 Stew. & Port. 102. **Grandfather, in preference to uncle.**—Phillips v. Peteet, 35 Ala. 696. **When creditor should apply.**—Curtis v. Williams, 33 Ala. 570. **When he has not abandoned his right.** Curtis v. Burt, 34 Ala. 729. **What an implied waiver of right.**—Curtis v. Burt, 34 Ala. 729; Forrester v. Forrester, 37 Ala. 398; Sowell v. Sowell, 41 Ala. 359.

2015 (2370). **Form of letters of administration.** — Letters of administration may be substantially in the following form:

"The State of Alabama, } Court of Probate.
——— county. }

"Letters of administration on the estate —— ——— (or letters of administration on the annexed will of —— ———, as the case may be), are hereby granted to —— ———, who has duly qualified and given bond as such administrator, and is authorized to administer such estate (or to execute such will, as the case may be). Witness my hand, and dated this —— day of ———, 18—.

—— ——, Judge of Probate."

2016 (2351). **When right to letters waived.**—If no person entitled to the administration of the estate, according to the first three subdivisions of the second preceding section, applies for letters within forty days after the death of the intestate is known, the persons so entitled must be held to have relinquished their right to the administration.

See citations to section 2014.

2017 (2352, 2353, 2354, 2355). **Rules as to grant of letters in certain cases.**—If several persons of the same degree of kindred to the intestate, computed by the rules of the civil law, are entitled to the administration, men are to be preferred to women, and the whole blood to the half blood; and when several persons are equally entitled thereto, the court may, in its discretion, grant letters to one or more of them; and when a

married woman is entitled thereto, it may be granted to her husband in her right.*

2018 (2356). **Renunciation; how made.**—Any person entitled to administration may relinquish his right thereto in the same manner as executors are authorized to renounce their appointment.

2019 (2357). **When letters must not be granted; examination of applicant, etc.**—No letters of administration must be granted until the expiration of fifteen days after the death of the intestate is known; and the court may, in all cases, examine the persons applying therefor, on oath, touching the time and place of the death of the intestate, and as to whether or not he left any will, and other matters necessary to give the court jurisdiction; and may also examine any other witnesses as to the same facts, and may compel their attendance for that purpose by subpœna and attachment.

2020 (2358). **Appointment of special administrator.**—The judge of probate may, in any contest respecting the validity of a will, or for the purpose of collecting the goods of the deceased, or in any other case in which it is necessary, appoint a special administrator, authorizing the collection and preservation by him of the goods of the deceased until letters testamentary or of administration have been duly issued.

Clements v. Walker, 40 Ala. 189; Clements v. Wilson, Ib. 219; Jordan v. Thompson, 67 Ala. 469.

2021 (2359). **His authority.**—Every such special administrator has authority to collect the goods and chattels of the estate, and debts of the deceased, and to secure and preserve such goods and chattels, at such expense as may be deemed reasonable by the probate court; and for such purposes he may maintain suits as administrator.

Flora v. Mennice, 12 Ala. 836; Erwin v. Branch Bank, 14 Ala. 307; Underhill v. Mobile Ins. Co., 67 Ala 45; Wolffe v. Eberlein, 74 Ala. 99; Briarfield v. Foster, 54 Ala. 622.

2022 (2360). **May sell perishable goods.**—Such special administrator may also, under the direction of the probate court, sell such goods as are perishable or wasting, after the same have been appraised, and notice has been given as in other cases of sale of personal property of an intestate.

2023 (2361). **When his authority ceases; his duties in such case.**—Upon the grant of letters testamentary or of administration, the authority of such special administrator ceases, and on demand he must deliver to the rightful executor or administrator all the assets of the deceased which may be in his hands, and render an account on oath of all his proceedings to the probate court.

Farrow v. Bragg, 30 Ala. 261.

2024 (2365, 2366). **Executors and administrators must give bond.**—Every person appointed executor, administrator, or special administrator, except in cases otherwise provided for in this chapter, must give bond, with at least two sufficient sureties, payable to, and to be approved by the judge of probate of the county having jurisdiction of the estate, in a penalty equal

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*"Men" for "males," and "women" for "females" substituted by joint committee.

to at least double the estimated value of the real and personal property of the estate, and conditioned to perform all the duties which are, or may be by law required of him as such executor or administrator.

Moore v. Chapman, 2 Stew. 466; Hosey v. Brasher, 8 Port. 559; Grimmet v. Henderson, 66 Ala. 522. **Joint bond.**—Elliott v. Mayfield, 4 Ala. 417; Little v. Knox, 15 Ala. 576; Williams v. Harrison, 19 Ala. 277; Pearson v. Darrington, 32 Ala. 228; Jones v. Jones, 42 Ala. 218. **Conditional delivery.**—Bibb v. Reid, 3 Ala. 88; Wright v. Lang, 66 Ala. 389.

2025 (2367). **Testator may exempt executor from giving bond; when no bond required; exceptions.**—Any testator may, by an express provision in his will to that effect, exempt an executor from giving bond; and, when such provision is made, such bond must not be required except in the following cases:

1. When any executor, heir, legatee, or other person interested in the estate, makes affidavit, showing his interest, and alleging that such interest is, or will be endangered for want of security.

2. When, in the opinion of the judge of probate, the estate is likely to be wasted, to the prejudice of any person interested therein.

Smith v. Phillips, 54 Ala. 8; Phillips v. Smith, 62 Ala. 575.

2026 (2368). **Proceedings when bond required of executor.** In the cases provided for by the preceding section, upon application for the executor to give bond, he may show cause against such application, and must have such notice as the judge may deem reasonable; but if he is not in the state, the application may be heard and determined without notice.

2027 (2362). **General administrator; his duties.**—Each judge of probate must also appoint a suitable person as general administrator within his county, who must take charge of the estates of deceased persons, or act as special administrator, in those cases in which no other persons entitled thereto will administer, and no other person is appointed by the court; and his office shall expire with the expiration of the term of the judge who appointed him, unless the succeeding judge shall continue him in office, which the succeeding judge may do; and the same bond, if otherwise sufficient, shall be good, and the administrator and sureties bound thereon.

Russell v. Erwin, 41 Ala. 292; Eubank v. Clark, 76 Ala. 73.

2028 (2371). **General administrator to give bond.**—The general administrator of a county must give bond, with at least two sufficient sureties, in an amount to be prescribed by the judge of probate, sufficient to secure all persons interested, payable to the judge of probate, and conditioned faithfully to administer all estates which may come to his charge as such general administrator; which bond must be approved by such judge.

2029 (2363, 2372). **Administration to sheriff or coronor; attaches to office.**—In case there is no general administrator, and no other fit person will administer, the court may commit administration to the sheriff or coronor of the county; and when so committed, the administration attaches to the office, and the official oath and bond of such officer are the security for his faithful administration.

Governor v. Gantt, 1 Stew. 388; King v. Griffin, 6 Ala. 387; McLaughlin v. Nelms, 9 Ala. 925; Thompson v. Bondurant, 15 Ala. 346; Ragland v. Calhoun, 36 Ala. 606; Payne v. Thompson, 48 Ala. 535; Landford v. Dunklin, 71 Ala. 594; Burnett v. Nesmith, 62 Ala. 261.

2030 (2364). **When estate not to be committed to general administrator, sheriff, or coronor.**—The administration of an estate must not be committed to the general administrator, or to the sheriff, or to the coronor, except as special administrator, until the death of the decedent has been known sixty days; nor until one month after the death, resignation, or removal of an executor or administrator previously appointed.

2031 (2373). **Bond required of applicant.**—When administration is committed to the general administrator, sheriff, or coronor, on the application of a third person, such letters must not be granted, unless such person enter into bond, with surety, to be approved by the judge, to pay the fees and allowances made by the court on such administration, if the property of the estate is insufficient therefor.

2032 (2374). **Summary decree against obligors on such bond.**—If, upon the settlement of an administrator appointed under the preceding section, it appears that sufficient assets of his intestate have not come to his hands to pay the costs and expenses legally incurred in his administration, the probate court having jurisdiction of such administration may render a decree, and thereon issue execution against the obligors in the bond mentioned in the preceding section, for any excess due above the assets in the hands of such administrator.

2033 (2375). **Liability of judge in taking bond.**—The judge of probate is liable for any neglect or omission in not taking bond, or for taking an insufficient bond from any executor or administrator; and any person injured thereby may maintain an action against such judge and his sureties, and recover according to the injury proved.

Hamilton v. Williams, 26 Ala. 527.

2034 (2376). **Conclusiveness of letters.**—Letters testamentary or of administration, and letters to a special administrator, or to any general administrator, sheriff, or coroner, granted by any probate court having jurisdiction, are conclusive evidence of the authority of the person to whom the same are granted, from the date thereof until the same are revoked; and, when granted, such letters exclude the probate court of every other county from the jurisdiction thereof, and extend to all the property of the deceased in the state.

Eslava v. Elliott, 5 Ala. 264; Duncan v. Stewart, 25 Ala. 408; Bradley v. Broughton, 34 Ala. 694; Gray v. Cruise, 36 Ala. 559; Landford v. Dunklin, 71 Ala. 594.

2035 (2377). **When, on appeal, letters not to issue.**—On application to execute a will, or administer an estate, no letters testamentary or of administration must issue until the time for taking an appeal from the decree thereon has passed; and if such appeal is taken, no letters in chief must be granted until the appeal is finally disposed of; but a special administrator may be appointed, if necessary.

2036 (2378). **Letters and bonds recorded; transcript evidence.**—All letters testamentary and of administration, general or special, and the bonds given by executors and administrators must be recorded by the judge of probate; and transcripts thereof, duly certified, are evidence in all the courts of this state to the same extent as if the originals were produced.

CHAPTER 4.

APPOINTMENT OF NON-RESIDENTS AS EXECUTORS AND ADMINISTRATORS, AND SPECIAL PROVISIONS IN RELATION TO THEM.

2037 (2379). **Non-residents may be appointed executors.** Judges of probate are authorized to issue letters testamentary to persons named as executors in wills regularly probated, who are non-residents of this state, upon like bond and surety, and upon the same terms, conditions and requirements as are required by law of citizens of this state.

2038 (2380). **Steps necessary to grant of such letters, when will probated in another state.** — When the will has been probated in another state or territory, before issuing letters testamentary thereon to a non-resident executor, the judge of probate must require him to file in court a copy of the will under which he is appointed, together with a certificate of the judge of the court in which the will was probated, that such will was regularly proved and established, and that letters testamentary were issued to him thereon, in accordance with the laws of the state or territory in which such original letters were granted, and also a certified copy of the bond or other security, if any, on file in the court from which such letters were issued.

2039. Non-residents may be appointed administrators. Feb. 13 18 9, p. 59. When any non-resident dies, leaving assets in this state, if no application for letters of administration is made by a relative or creditor entitled thereto, an administrator of his estate, appointed by the competent authority of the state or territory of his domicil, shall be entitled to letters of administration on such estate in this state, upon the production of the letters granted to him by the state or territory of his intestate's domicil, duly certified as required by law, in preference to any other person, upon his giving like bond and surety, and upon the same terms, conditions and requirements, as are required by law of citizens of this state. The certified copy of his foreign letters shall be filed and recorded in the office of the judge of probate issuing letters in this state.

2040 (2381). **How estate administered and settled.**—When letters are granted to a non-resident executor or administrator under this chapter, the assets of the estate upon which such letters are granted, which may be within this state at the date of such letters, shall, in all respects, be administered and settled as if such letters had been issued to a resident executor or administrator.

2041 (2382). **How notice and process served.**—Citations to make settlements, and other citations or notices to such non-resident executor or administrator, and all writs or legal process, including executions on decrees and judgments, may be served by delivering a copy thereof to one of the sureties on the bond of such executor or administrator, and by depositing a copy thereof, enclosed in a sealed envelope, plainly addressed and directed to such executor or administrator at the place, and

by the name which shall be furnished by him on making application for letters, in the post-office at or nearest the office of the judge issuing the letters; and thereupon the sheriff executing the same shall make his return accordingly. If, on making application for letters, the name of the place of his address is not furnished by such executor or administrator, service on one of his sureties will be sufficient.*

2042 (2383). **Liability of sureties to execution.**—Upon the return of an execution as provided in the preceding section, and, further, that no property of such executor or administrator, or property not sufficient to satisfy the same, is found in the county in which the execution is issued, the sureties on his bond shall be liable in all respects as in cases of a return of no property found on executions issued against resident executors or administrators.

2043 (2384). **Removal to other state no ground for removal of executor; how settlement made.**—The removal of any resident executor from this state to any other state or territory of the United States, shall not be cause for his removal from the office of executor; but on and after his removal, he shall in all respects be regarded and treated as a non-resident executor, and the provisions of this chapter shall be applicable to him. But, upon such removal, his sureties may require him to resign and make final settlement of his accounts, or give a new bond as such executor.

CHAPTER 5.

REMOVAL, RESIGNATION AND REQUIRING ADDITIONAL BONDS OF EXECUTORS AND ADMINISTRATORS; APPOINTMENT OF ADMINISTRATORS DE BONIS NON; PROCEEDINGS ON DISCOVERY OF WILL AFTER GRANT OF LETTERS.

2044 (2385). **Removal on application of surety.** — Upon the application in writing of any surety or sureties on the bond of an executor or administrator, made at any time after two years from the grant of letters to the probate court from which letters testamentary or of administration issued, requesting to

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* On 16th February, 1887 (Pamph. Acts, 1886–7, p. 142), an act was approved, amending section 2382 of the Code of 1876; and the section, as amended, is as follows:

§ **2382. How notices served and legal process, including executions, notices, etc.**—Citations to settlements or other citations or notices to such non-resident executors, and all other writs or legal process, including executions on decrees and judgments, may be served by depositing a copy in a sealed envelope in a post-office of the United States at or nearest to the office of the court or officer issuing such process, such envelope to be plainly addressed and directed to such non-resident executor at the place and by the name by him furnished upon the filing of his application for letters, and when the sureties, or any of them, reside withing this state, and their place of residence is known, by the service of a copy of such writ or process upon one of such sureties, and the sheriff so executing such process shall make his return according; *Provided*, That when service is had under this section by depositing a copy in the post-office only, such service shall not take effect until the expiration of ten days from the date of mailing said copy.

Section 2041 of this Code, while embodying the section amended, has a broader scope; and hence, the amendment is given in a note.

be discharged from future liability as such surety or sureties, it shall be the duty of the court to give to such executor or administrator notice of such application, and require him, within thirty days after the service of the notice, to make a new bond; and upon the failure to make such bond, such executor or administrator shall be removed, and his letters revoked; and upon such removal, he shall be required to make settlement of his administration as required by law in other cases.

2045 (2386). **Causes of removal.**—An administrator may be removed, and his letters revoked for his removal from the state; and an administrator or executor may be removed and his letters revoked for any of the following causes:

1. Imbecility of mind; intemperance; continued sickness, rendering him incapable of the discharge of his duties.

2. Failure to make and return inventories or accounts of sales; failure to make settlements as required by law; or the failure to do any act as such executor or administrator, when lawfully required by the judge of probate.

3. The wasting, embezzlement, or any other maladministration of the estate.

Application for removal.—Blackman v. Davis, 42 Ala. 184; Hubbard v. Smith, 45 Ala. 516; Crawford v. Tyson, 46 Ala. 299; Godwin v. Hooper, 45 Ala. 613. **Nonresidence as ground of removal.**—Harris v. Dillard, 31 Ala. 191; Crawford v. Tyson, 46 Ala. 299. **What sufficient under second subdivision.**—Oglesby v. Howard, 43 Ala. 144. **What insufficient thereunder.**—Hubbard v. Smith, 45 Ala. 516; Hightower v. Moore, 46 Ala. 466. **What not sufficient under third subdivision.**—Forrester v. Forrester, 37 Ala. 398.

2046 (2387). **When required to give additional bond; effect of failure.**—An executor or administrator may also be required to give additional bond, and, in default thereof, may be removed, and his letters revoked, in the following cases:

1. When it is shown to the court by his sureties, or either of them, that he has become, or is likely to become insolvent, and that they have sustained, or probably will sustain loss thereby.

2. When his letters have been granted on insufficient security, or the security has become insufficient since the grant, or any of his sureties have removed from the state.

3. When the penalty of the bond is not sufficient to secure the due performance of the trusts committed to him.

2047 (2388, 2389). **Application for additional bond, or for removal.**—Application for the removal of any executor or administrator, or for an additional bond, must be in writing, verified by oath, must specify the grounds of complaint, and must be made to the court from which letters issued; and may be made by any creditor, legatee, devisee, heir, or distributee, or by any co-executor, co-administrator, or the sureties, or any of them.

2048 (2390). **Citation to issue; service of.**—A citation to such executor or administrator to appear and answer the application on a day specified therein, must be served on him five days before the hearing of the complaint.

2049 (2391, 2392). **When notice given by publication; expense, how paid.**—If such executor or administrator is not an inhabitant of the state, or is absent therefrom, upon such fact being shown by proof satisfactory to the judge, he must direct notice of such application to be given by publication for three successive weeks in some newspaper published in the county, or

if none is published therein, in the newspaper published nearest to the court-house thereof; and the applicant must pay the expense of such publication, which may be taxed as costs.

Crawford v. Tyson, 46 Ala. 299.

2050 (2393, 2394). **Trial; when jury allowed.**—On the day specified in the citation, or after publication is required, or on any day thereafter to which the hearing may be continued, the court must proceed to hear the evidence, and may, in its discretion, examine the parties; and when the application charges embezzlement, waste, or any other maladministration of the estate, either party is entitled to a trial by jury.

2051 (2395). **Costs; against whom taxed.**—If the application is determined against the applicant, he, otherwise the executor or administrator, must be taxed with the costs, for which execution may be issued.

2052 (2396, 2397). **Order to give additional bond; effect of failure.**—If an additional bond is required by the court, an order must be made to that effect, allowing such time to give the same as the court may think reasonable; and if such order is not complied with within the time prescribed, the executor or administrator must be removed, and his letters revoked.

2053 (2398, 2399). **Removal or additional bond on motion of court.**—Whenever the judge of probate has reason to believe that any just ground or cause of removal exists, or that an additional bond should be required of an executor or administrator, he may cause a citation to be served on such executor or administrator, requiring him to appear on a day therein named, five days after service thereof, and show cause why he should not be removed, or give an additional bond, as the case may be; and if no sufficient cause is shown, the court may remove such executor or administrator, or require him to give an additional bond; and, if an additional bond is required, on failure to give the same within the time prescribed, the court may remove him.

Crawford v. Tyson, 46 Ala. 299.

2054 (2400). **General administrator; when and how removed.**—The general administrator may be removed for the same causes as other administrators; and such removal may be made by the judge of probate without notice; but the grounds thereof must be entered on the minutes of the court.

2055 (2401). **Additional bond of general administrator; effect of failure to give.**—An additional bond may also be required of a general administrator, whenever the judge of probate deems it necessary to secure the interests of the estate confided to his charge, or the sureties may be unwilling to remain longer bound; and, if he fail to give such bond within the time prescribed by the court, he must be removed and his letters revoked; and when any person interested in an estate committed to the general administrator shall give notice in writing to the judge of probate, that the interest of the estate requires that the general administrator should give an additional bond, such judge must require him to give such bond; and if, in such case, the judge of probate fails or omits to require such bond, and loss thereby results to any one interested, he and the sureties on his official bond shall be responsible therefor.

2056 (2402). **Additional bond of sheriff or coroner.**—When

the administration of any estate is committed to the sheriff or coroner, the judge of probate, at such time, or at any time thereafter, while the administration is in the hands of such officer, may require of him an additional bond, if, in his opinion, the official bond of such officer is not sufficient security for the protection of the estate; and if he fail to give such additional bond for ten days after notice that the same is required, he vacates his office, and the judge of probate must certify the vacancy to the appointing power.

2057 (2405). **When sureties discharged by additional bond.**—When an additional bond is given on the application of the surety of an executor or administrator, such surety is discharged as to all breaches subsequent to the execution and approval of the additional bond.

2058 (2406). **When former bond of force.**—When the additional bond is not given on the application of a surety, the former bonds are not discharged, but each remains of the same force and obligation as if such additional bond had not been given; and any person aggrieved, for a breach of the last bond, may proceed on either or all of such bonds, in the same, or in separate proceedings.

Jones v. Ritter, 56 Ala. 270.

2059 (2407). **Rights of sureties on such bonds among themselves.**—The sureties in either bond, who have been compelled to make any payments thereon for the principal obligor, on a breach subsequent to the execution of the last bond, have the same remedies against the sureties in the remaining bonds as co-sureties have against each other; and may recover against such sureties such an amount as shall be in the same proportion to the sum paid by the plaintiff, as the aggregate penalty of the two bonds bears to the penalty of the bond of the defendant, apportioning the same among the solvent sureties.

2060 (2408). **Resignation of representative.**—An executor or administrator may, by a writing subscribed by him, resign; and his resignation must be entered of record.

Skinner v. Frierson, 8 Ala. 915; Gayle v. Elliott, 10 Ala. 264; Rambo v. Wyatt, 32 Ala. 363.

2061 (2409). **Liability on resignation.**—In case of resignation, the executor or administrator and his sureties are bound for all the assets not administered, which shall not be delivered over to his successor.

2062 (2410). **Resignation by general administrator; effect of.**—The resignation of the office of general administrator shall not operate to discharge the incumbent from the administration of any estate previously committed to his charge as such general administrator; but he may proceed, notwithstanding such resignation, to administer and finally settle the same, as if he had not resigned such office; and the sureties on his bond as general administrator shall be liable for every act of maladministration on such estate, committed after his resignation, to the same extent as if he had not resigned; but he may be removed from the administration of such estate for any of the causes prescribed by law, or he may resign his administration thereon by leave of the probate court of his county.

2063 (2411). **Upon resignation or removal of general ad-**

ministrator, successor appointed.—Upon the resignation or removal of a general administrator from office, the judge of the probate court of the proper county must proceed to appoint some other suitable person general administrator for such county, who shall give bond as required by law, and administer on such estates as may be committed to his charge by the probate court of his county.

2064 (2412). **Administrator de bonis non or cum testamento annexo; when appointed.**—If the sole executor, or all the executors or administrators die, resign, or are removed, the probate court having jurisdiction of the estate must grant letters of administration, with the will annexed, or of the goods and chattels, rights, etc., unadministered, to the person entitled thereto, as in cases of intestacy.

What essential to validity of grant.—Matthews v. Douthitt, 27 Ala. 273; Rambo v. Wyatt, 32 Ala. 363; Sims v. Waters, 65 Ala. 442. **When upheld on collateral attack.**—Ikelheimer v. Chapman, 32 Ala. 676; Gray v. Cruise, 36 Ala. 559; Sims v. Waters, 65 Ala. 442; Green v. Scarborough, 49 Ala. 137; Chappell v. Williamson, Ib. 153; Cogburn v. McQueen, 46 Ala. 551. **When grant void.**—Nelson v. Boynton, 54 Ala. 368; Hooper v. Scarborough, 57 Ala. 510; Bean v. Chapman, 69 Ala. 140; Coltart v. Allen, 40 Ala. 155. **In such case, acts of party acting under grant invalid.**—Hooper v. Scarborough, 57 Ala. 510. **When grant of letters in chief valid as letters de bonis non.**—Mosely v. Mastin, 37 Ala. 216.

2065 (2413). **When survivor continues to act.**—When an executor or administrator dies, resigns, or is removed, and there is any other executor or administrator, no other must be appointed; but such administrator or executor must complete the administration, unless the testator has provided by his will for the nomination or appointment of a substitute or successor, when the person nominated, in accordance with the provisions of the will, shall be permitted to qualify as executor.

2066 (2414). **On proof of will, etc., letters must be revoked.** If, after letters of administration have been granted as in case of intestacy, any will is proved, and the executor therein named appears, claims letters testamentary, and complies with the requisitions of the law, the probate court having jurisdiction must revoke the letters of administration, and grant letters testamentary to such executor.

Broughton v. Bradley, 34 Ala. 694; Jennings v. Moses, 38 Ala. 402; Watson v. Glover, 74 Ala. 323.

2067 (2415). **When, in such case, will to be annexed.**—If, in the case provided for by the preceding section, the sole executor, or some of the executors, within five days after the proof of such will, do not appear and take out letters testamentary thereon, a copy of the will must be annexed to the letters of administration, and must be executed by the administrator.

CHAPTER 6.

COLLECTION OF DECEDENT'S PERSONAL PROPERTY; INVENTORY AND APPRAISEMENT THEREOF; NOTICE OF APPOINTMENT.

2068 (2416). **Collection of personalty and inventory.**—It is the duty of every executor or administrator, immediately after taking out letters, to collect and take into his possession

the goods and chattels, money, books, papers, and evidences of debt of the decedent, except the personal property specifically exempted from administration under section 2545, and to make a full inventory of the same.

2069 (2417). **What inventory must show.**—The inventory must set forth the goods and chattels, enumerating each article separately, all debts or demands due or accruing to the decedent, the time such debts or demands are due, the amount of the same, and how evidenced, with the credits, if any, and the name of the debtor, and the amount of money.

Dabbs v. Cockerham, 2 Port. 328; Weems v. Bryan, 21 Ala. 302; Judge v. Tyson, 42 Ala. 401.

2070 (2418). **Inventory returned under oath.**—On the return of the inventory, the executor or administrator must take and subscribe an oath, to be administered by the judge of probate, or any justice of the peace, or notary public of the county, that such inventory is full and complete, as to the goods and chattels, debts and money of the decedent, which have come to his knowledge or possession. As amended, Dec. 8, 1880, p. 51.

Effect of inventory.—Steele v. Knox, 10 Ala. 608; Reynolds v. Reynolds, 11 Ala. 1023; Craig v. McGehee, 16 Ala. 41; Judge v. Tyson, 42 Ala. 401; McDonald v. Jacobs, 77 Ala. 524.

2071 (2419, 2420, 2421). **Appraisement of personal property.**—At the time of the grant of letters, the court must appoint three appraisers in each county in which it is necessary to make an appraisement of the estate of the decendent, who must appraise each article specified in the inventory made by the executor or administrator, at its true value, and set down opposite to such articles, respectively, the values thereof in dollars and cents, in figures; and the appraisement must be subscribed and sworn to by them, and the executor or administrator is authorized to administer the oath.

Appraisement as evidence against administrator.—Harrison v. Harrison, 39 Ala. 489.

2072 (2422). **Return of inventory and appraisement.**—The inventory and appraisement must be returned within two months after the grant of letters.

2073 (2423, 2424). **Supplemental inventories and appraisements.**—The executor or administrator must make supplemental inventories of the decedent's estate coming to his knowledge or possession after making the first inventory; and an appraisement must be made of such estate by the appraisers, on oath, and in the same manner as the first appraisement was made.

2074 (2425). **Appointment of new appraisers.**—New appraisers may be appointed by the court, from time to time, as may be necessary.

2075 (2426). **Notice of appointment of personal representative; its contents.**—Executors and administrators must also, within one month from the grant of letters, give notice of their appointment, stating the name of the deceased, the day on which letters were granted, by what court, stating the county, and notifying all persons having claims against the estate to present the same within the time allowed by law, or that the same will be barred.

Failure to give does not suspend statute of non-claim.—Bank v. Plannett, 37 Ala. 222.

2076 (2427). **How notice to be given.**—Such notice must be given in a newspaper published in the county in which the letters were granted, or, if none is published in such county, in the one published nearest to the court-house thereof, or in an adjoining county; and it must be published once a week for three successive weeks.

2077 (2428). **Penalty for failure to give notice.**—It is the duty of the judge of probate to see that such publication is duly made; and any executor or administrator failing to make the same must not be allowed any compensation as such; but he and his sureties are liable, on proof that such notice has not been given, to any creditor for the amount which he would have been entitled to out of the assets of the estate, had his claim been duly presented.

CHAPTER 7.

PAYMENT AND SETTLEMENT OF DEBTS, AND PRESENTATION OF CLAIMS; RENTING OF REAL ESTATE, AND SALES OF PROPERTY.

ARTICLE 1.—Payment and settlement of debts; presentation of claims.
2.—Sales of personal property for payment of debts, and for distribution.
3.—Renting of real estate; sale of real estate for payment of debts and for division.

ARTICLE I.

PAYMENT AND SETTLEMENT OF DEBTS; PRESENTATION OF CLAIMS.

2078 (2429). **Property charged with payment of debts.** All the property of the decedent, except as otherwise provided, is charged with the payment of his debts, and, if necessary, may be sold for that purpose.

Anderson v. McGowan, 42 Ala. 280; Steele v. Steele, 64 Ala. 439; Starke v. Wilson, 65 Ala. 576; Lewis v. Ford, 67 Ala. 143; Sharp v. Sharp, 76 Ala. 312; Trimble v. Fariss, 78 Ala. 260.

2079 (2430). **Order of payment of debts.**—The debts against the estates of decedents are to be paid in the following order:

1. The funeral expenses.
2. The fees and charges of administration.
3. Expenses of the last sickness.
4. Taxes assessed on the estate of the decedent previous to his death.
5. Debts due to employes, as such, for services rendered the year of the death of the decedent.*
6. The other debts of the decedent.

Tombstone a proper charge, and classed as funeral expenses.—Hatchett v. Curbow, 59 Ala. 516. See, also, Bendall v. Bendall, 24 Ala. 295. **When expenses for burial of wife a debt against husband alone.**—Lott v. Graves, 67 Ala. 40; Smyley v. Reese, 53 Ala. 89. **Burial expenses; nature of claims for.**—Gayle v. Johnston, 72 Ala. 254.

2080 (2431). **No preference among debts of same class.** No executor or administrator must, before the expiration of eighteen months from the grant of letters, give a preference in

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* "Employes" substituted for "overseers" by joint committee.

the payment of any debt over others of the same class; nor is a debt due and payable entitled to any preference over debts of the same class which are not due.

Effect of statute on right of retainer.—Shortridge v. Easley, 10 Ala. 520; Kimball v. Moody, 27 Ala. 130; Bates v. Vary, 40 Ala. 421; Kirksey v. Kirksey, 41 Ala. 626.

2081 (2597). **Presentation of claims; when claims barred.** All claims against the estate of a deceased person must be presented within eighteen months after the same have accrued, or within eighteen months after the grant of letters testamentary or of administration; and if not presented within that time, they are forever barred.

What claims within the statute.—Generally, all claims, whether absolute or conditional, payable presently or in the future.—Jones v. Lightfoot, 10 Ala. 17; King v. Moseley, 5 Ala. 610; Neil v. Cunningham, 2 Port. 171; Ready v. Thompson, 4 Stew. & Port. 52; McBroom v. Governor, 6 Port 32; Winston v. Branch Bank, 23 Ala. 762; Harrison v. Harrison, 39 Ala. 489; Fretwell v. McLemore, 52 Ala. 124; Halfman v. Ellison, 51 Ala 543; Ray v. Thompson, 43 Ala. 434; Foster v. Holland, 56 Ala. 474; McDowell v. Jones, 58 Ala. 25; Owens v. Corbitt, 57 Ala. 92; Rhodes v. Hannah, 66 Ala 215; Taylor v. Robinson, 69 Ala. 269; Jones v. Drewry, 72 Ala. 311; Farris v. Stoutz, 78 Ala. 130. **What claims not within the statute.**—Enforcement of specific liens.—Duval v. McLoskey, 1 Ala. 708; Inge v. Boardman, 2 Ala. 331; Mahone v. Haddock, 44 Ala. 92; George v. George, 67 Ala. 192. Equities of redemption.—Locke v. Palmer, 26 Ala. 312. Claim for family expenses incurred under a will.—Prince v. Prince, 47 Ala. 283. **When will does not create trust in favor of creditor,** relieving him from necessity of presenting claim.—Carrington v. Manning, 13 Ala. 611. **Time from which statute begins to run.**—Generally, from grant of letters.—Cawthorne v. Weisinger, 6 Ala. 714; Bank v. Plannett, 37 Ala. 222; McHenry v. Wells, 28 Ala. 451. On contingent claims, from time contingency happens—Neil v. Cunningham, 2 Port. 171; Hooks v. Branch Bank, 8 Ala. 580; Jones v. Lightfoot, 10 Ala. 17; Pinkston v. Huie, 9 Ala. 252; McDowell v. Jones, 58 Ala. 25; Cockrill v. Hobson, 16 Ala. 391; Farris v. Stoutz, 78 Ala. 130. Contingent claims defined.—Neil v. Cunningham, 2 Port. 171; Cockrill v. Hobson, 16 Ala. 391; McDowell v. Jones, 58 Ala. 25; Farris v. Stoutz, 78 Ala. 130; Jones v. Lightfoot, 10 Ala. 17. **Removal of administrator from state and continued absence do not stop running of statute.**—Lowe v. Jones, 15 Ala. 545. **Nor his death.**—Ib.; Pipkin v. Hewlett, 17 Ala. 291. **Nor failure of representative to give notice of appointment.**—Bank v. Plummett, 37 Ala. 222; Cawthorne v. Weisinger, 6 Ala. 714; McHenry v. Wells, 28 Ala. 451. **Nor absence from state.**—Branch Bank v. Donelson, 12 Ala. 741. **Nor facts of this case.**—Gordon v. Ballentine, 50 Ala. 99. **When not waived.**—Pipkin v. Hewlett, 17 Ala. 291. **Statute suspended during late war.**—Grace v. Martin, 47 Ala. 135. **Statute runs against estate of deceased creditor,** though administration was not granted thereon until after the lapse of eighteen months from the grant of administration upon estate of deceased debtor.—Beasley v. Waugh, 51 Ala. 156. **Fraud does not prevent the bar of the statute.**—Yniestra v. Tarleton, 67 Ala. 126; Morgan v. Morgan, 68 Ala. 80; Taylor v. Robinson, 69 Ala. 269. **By whom presented.**—Presentation can only be made by party having an interest in the claim, and a right, legal or equitable, to enforce it. McDowell v. Jones, 58 Ala. 25; Allen v. Elliott, 67 Ala. 432; Branch Bank v. Hawkins, 12 Ala. 755; Hallett v. Branch Bank, Ib. 193; Jones v. Lightfoot, 10 Ala. 970. Hence, presentation by a personal representative whose appointment is void, is not sufficient.—McDowell v. Jones, 58 Ala. 25. **Knowledge on the part of the administrator will not dispense with necessity of presentation.**—Jones v. Lightfoot, 10 Ala. 17; Boggs v. Branch Bank, Ib 970; Hallett, v. Branch Bank, 12 Ala. 193; Pipkin v. Hewlett, 17 Ala. 291; Clark v. Washington, 44 Ala. 291; Owens v. Corbitt, 57 Ala. 92; McDowell v. Jones, 58 Ala. 25; Allen v. Elliott, 67 Ala. 432 **Statute available to creditors.**—McBroom v. Governor, 6 Port. 32. **Also to heirs or devisees.**—May v. Parham, 68 Ala. 253; Farris v. Stoutz, 78 Ala. 130. **Need not be presented to all the personal representatives.** Mardis v. Shackelford, 4 Ala 493. **Presentation to administrator whose letters voidable, sufficient.**—Floyd v. Clayton, 67 Ala. 265. **Repeated presentations not required.**—Floyd v. Clayton, 67 Ala. 265. **What a sufficient presentation.**—Jones v. Pharr, 3 Ala. 283; Pollard v. Scears, 28 Ala. 484; Harrison v. Jones, 33 Ala. 258; Frazier v. Prayton, 36 Ala. 691; Hallett v. Br. Bank, 12 Ala. 193; Posey v. Decatur Bank, Ib. 802; Walker v. Wigginton, 50 Ala. 579. **By suit.**—Hunley v. Shuford, 11 Ala. 203; Floyd v. Clayton, 67 Ala. 265. **What not a sufficient presentation.**—Jones v. Lightfoot, 10 Ala. 17; Badger v. Kelly, Ib. 944; Waddill v. John, 57 Ala. 93; Bibb v. Mitchell, 58 Ala. 657; Halfman v. Ellison, 51 Ala. 543; Bigger v. Hutchings, 2 Stew. 445; Smith v. Fellows, 58 Ala. 467; Clark v. Wash-

ington, 44 Ala. 291; Floyd v. Clayton, 67 Ala. 265 **By suit.**—Boggs v. Branch Bank, 10 Ala. 970; Travis v. Tartt, 8 Ala. 574; Dilbone v. Moore, 14 Ala. 426; Pipkin v. Hewlett, 17 Ala. 291; Bigger v. Hutchings, 2 Stew. 445. **What necessary on presentation.**—Smith v. Fellows, 58 Ala. 467; Bibb v. Mitchell, Ib. 657; Bigger v. Hutchings, 2 Stew. 445; Floyd v. Clayton, 67 Ala. 265. **Effect of misnomer in filing claim.**—Halfman v. Ellison, 51 Ala. 543. **Effect of failure to docket.**—Floyd v. Clayton, 67 Ala. 266. **Claim must remain on file.**—Ib. **The statute a complete bar.**—Thrash v. Sumwalt, 5 Ala. 13; McBroom v. Governor, 6 Port. 32; Branch Bank v. Hawkins, 12 Ala. 755; Jones v. Lightfoot, 10 Ala. 27; Halfman v. Ellison, 51 Ala. 543. But see Duval v McLoskey, 1 Ala. 708. **Claim can not be revived by promise of administrator.**—Branch Bank v. Hawkins, 12 Ala. 755. **Bar cannot be asserted by any other person liable on same debt.**—Hooks v. Branch Bank, 8 Ala. 580. **Right of surety, on payment of debt, not impaired by omission of creditor to present.**—Hooks v. Branch Bank, 8 Ala. 580. **Failure of creditor to present does not discharge sureties,** or affect his right to proceed against them.—Minter v. Branch Bank, 23 Ala. 762. **Nor release one surety from liability to contribution** to another who subsequently paid the debt.—Evans v. Evans, 16 Ala. 465. **At law the bar of the statute must be specially pleaded.**—Smith v. Huie, 14 Ala. 201; Mardis v Smith, 2 Ala. 382; Branch Bank v. Hawkins, 12 Ala. 755. **In equity may be asserted by answer, plea, demurrer, or motion to dismiss.**—Fretwell v. McLemore, 52 Ala. 137; Owens v. Corbitt, 57 Ala 92; Yniesta v. Tarleton, 67 Ala. 126; Grimball v. Mastin, 77 Ala. 553; Farris v. Stoutz, 78 Ala. 130. **Burden of proof on the creditor.**—Evans v. Norris, 1 Ala. 511; Mitchell v. Lea, 57 Ala. 46; May v. Parham, 68 Ala. 253. **When admissions of administrator sufficient proof.**—Pharis v. Leachman, 20 Ala. 662.

2082 (2598). **Who allowed longer time.**—The provisions of the preceding section do not apply to minors or persons of unsound mind, who are allowed eighteen months after the removal of their respective disabilities, or to heirs or legatees claiming as such.

"**Heirs or legatees claiming as such.**"—Fretwell v McLemore, 52 Ala. 124 (overruling Harrison v. Harrison, 39 Ala. 489); Owens v. Corbitt, 57 Ala. 92; Taylor v. Robinson, 69 Ala. 269; McDowell v. Jones, 58 Ala. 25; Foster v. Holland, 56 Ala 474; Rhodes v. Hannah, 66 Ala. 215. **That minor has a guardian, does not affect his rights.**—Moore v. Wallis, 18 Ala. 458.

2083 (2599). **Presentation of claims; how made.**—The presentation may be made either to the executor or administrator, or by filing the claim, or a statement thereof, in the office of the judge of probate in which letters were granted, in which case the same must be docketed, with a note of the time of such presentation; and if required, a statement must be given by such judge, showing the time of presentation.

See citations to section 2081.

2084 (2600). **When revival of suit a presentation.**—The revival of any action pending against any person at the time of his death, which by law survives against his personal representative, by notice on the executor or administrator, within eighteen months after the grant of letters, shall be considered as a presentation of the claim on which the action is founded.

See citations to 2081.

2085 (2601). **Costs against plaintiff, on failure to prove presentation.**—In any action against an executor or administrator, commenced after the death of the decedent, if the plaintiff fails to prove a presentation of the claim or demand, he must pay the costs of suit, although he may recover.

Wallace v. Nelson, 28 Ala. 282; Mitchell v. Lea, 57 Ala. 46.

2086 (2494). **When representative protected in payment of debts.**—The payment of any debt against the estate by the executor or administrator, after eighteen months from the grant of letters, protects him, to the extent of the payment, from lia-

bility on any other debt against such estate which had not been presented at the time of such payment.

2087 (2495). **Payment of debts not due.**—Any debt not due, which has been presented, may be paid by an executor or administrator after eighteen months from the grant of letters, and the provisions of the preceding section include such debts; but such payment must not be made, unless the creditor accept, in discharge of such debt, such an amount as, with interest from the day of payment to the day when such debt is due, would make the amount thereof.

2088 (2505). **Sale or compromise of bad or doubtful claims.** The probate court having jurisdiction of the estate may authorize any executor or administrator to compromise or sell any bad or doubtful claim due the estate, on the written application of the executor or administrator, verified by his affidavit, and stating the facts, supported by evidence satisfactory to the court, that such claim is bad or doubtful, and that a compromise or sale thereof will promote the interests of the estate.

2089 (2505). **Hearing of application; sale, and notice thereof.**—Such application must not be heard until the next succeeding term after the filing thereof, when, or at such time as the court may continue the hearing, the court, if satisfied that the claim is bad or doubtful, and that a sale or compromise thereof will promote the interests of the estate, must make and enter a decree directing the sale or compromise of the claim, as may be best for the interests of the estate; and if a sale is decreed, it must be made by the executor or administrator at the court-house of the county, at public outcry to the highest bidder for cash, after having first given notice of the time and place thereof by publication, once a week for three successive weeks, in some newspaper published in the county, or if none is published therein, by posting notices for three weeks at the court-house door, and three other public places in the county.

2090 (2506). **Report of compromise or sale.**—The executor or administrator shall make report, in writing and under oath, of such sale or compromise within thirty days thereafter; and when such report is made, the sale or compromise may be confirmed unless good cause be shown for setting the same aside.

2091 (2432). **When administrator may give note in settlement of debt.**—Any executor or administrator, by authority of the probate court given on his written application, may, in his representative capacity, give his note, bond, or bill for the purpose of extending or settling a debt of the decedent, or settling a debt contracted by such representative for articles, or for work and labor for the estate; and for such note, bond, or bill the estate is liable, and the executor or administrator is not personally liable.

Wilburn v. McCalley, 63 Ala. 436; s. c., 77 Ala. 549.

ARTICLE II.

SALES OF PERSONAL PROPERTY FOR PAYMENT OF DEBTS, AND FOR DISTRIBUTION.

2092 (2433). **Power of sale conferred.**—Any part of the personal property of a decedent, including land warrants, may be sold by order of the court, on the written application of the ex-

ecutor or administrator, verified by affidavit, in the following cases, unless, in such cases, power to sell is conferred by the will:

1. For the payment of debts.
2. To make distribution among the distributees or legatees.
3. To prevent the waste or destruction of property liable to waste, or of a perishable nature, if it is proved that the sale would be beneficial to the estate.

Jurisdiction statutory and limited.—Wyatt v. Rambo, 29 Ala. 510; Ikelheimer v. Chapman, 32 Ala. 676; Hall v. Chapman, 35 Ala. 553; Hatcher v. Clifton, 33 Ala. 301; Whorton v. Moragne, 62 Ala. 201. **Without jurisdiction, unless title in administrator.**—Whorton v. Moragne, 62 Ala. 201. **When order of sale a nullity.** Hall v. Chapman, 35 Ala. 553; Beene v. Collenberger, 38 Ala. 647; Wilson v. Armstrong, 42 Ala. 168; Wyatt v. Rambo, 29 Ala. 510; Ikelheimer v. Chapman, 32 Ala. 676; Hatcher v. Clifton, 33 Ala. 301; Wilson v. Armstrong, 42 Ala. 168. **When sustained on collateral attack.**—Hatcher v. Clifton, 33 Ala. 301; Ward v. Hudspeth, 44 Ala. 215; Reynolds v Kirkland, Ib. 312; Harris v. Parker, 41 Ala. 604. **Private sale by personal representative void.**—Weir v. Davis, 4 Ala. 442; Dearman v. Dearman, Ib. 521; Fambro v. Gantt, 12 Ala. 298; Swink v. Snodgrass, 17 Ala. 653; Hopper v. Steele, 18 Ala. 828; Lay v. Lawson, 23 Ala. 390. **But he may compromise or settle debts due estate.**—Woolfork v. Sullivan, 23 Ala. 548. **No authority to sell under statute for distribution, when power vested by will.**—McCollum v. McCollum, 33 Ala. 711.

2093 (2434). **Notice of application; how given.**—Notice of such application must be given in such manner, and for such length of time, not less than three weeks, as the judge of probate may require; but when the property is perishable, and is so specified in the application, no notice is required, if the judge is satisfied of the truth of the allegations contained in the application.

Adkinson v. Wright, 46 Ala. 598.

2094 (2435). **Application may be contested.**—Any person interested may appear and contest such application, and show that no sale is required, or that it is more for the interest of the estate that other personal property should be sold.

2095 (2436). **Notice of sale.**—When the application is granted for the sale of any personal property, the executor or administrator must advertise for three successive weeks the day, place and terms of sale, and a description of the property, either in some newspaper, or at the court-house door, and three other public places in the county, as the court may prescribe; but if no newspaper is published in the county, advertisement must be posted up as above directed.

2096 (2437). **Hours of sale.**—Such sale must not commence before the hour of eleven in the morning, nor continue longer than four in the afternoon; and, if not completed within those hours, it may be continued from day to day.

2097 (2438, 2444). **Terms of sale.**—Such sale may be for cash, or on credit not exceeding twelve months, as the court may direct; and if on credit, notes or bonds, with at least two sufficient sureties, must be taken by the executor or administrator.

Lay v. Lawson, 23 Ala. 377; Searcy v. Holmes, 45 Ala. 225.

2098 (2439, 2440, 2441). **Crops commenced by decedent; nature and sale of.**—Any crop commenced by a decedent may be completed and gathered by the executor or administrator, and, the expenses of the plantation being deducted therefrom, is assets in his hands, and may be sold by him at private sale, either in or out of the state.

Loeb v. Richardson, 74 Ala. 311; Taylor v. Bush, 75 Ala. 432.

2099 (2442). **Sale of stock of goods.**—When any person engaged in mercantile business dies, leaving a stock of goods, wares, or merchandise, and leaving no surviving partner in such business, the executor or administrator of his estate may sell such stock of goods, wares, or merchandise, either at public or private sale, by wholesale or retail, upon first obtaining an order for such sale, as hereinafter provided, from the probate court having jurisdiction of the estate.

Harris v. Parker, 41 Ala. 605.

2100 (2443). **Contents of application; when order made.** To obtain such order, the executor or administrator must file in such court an application in writing, verified by his oath, setting forth with reasonable certainty the kind, quantity and estimated value of such goods, wares, or merchandise, and any facts or circumstances that may render it necessary or expedient to sell the same; and if it should appear to the court that it would benefit those interested in the estate that such order should be made, the court must make the same, and may, in its discretion, prescribe such terms and conditions of sale as may seem to the court most advantageous to those interested in the estate; but such sale must be made within one year from the making of such order.

2101 (2445). **Returns of accounts of sales.**—All accounts of sales of personalty made by the executor or administrator must be returned on oath, within thirty days after such sale, and must be recorded; and such returns may be compelled by attachment.

ARTICLE III.

RENTING OF REAL ESTATE; SALES OF SAME FOR PAYMENT OF DEBTS, AND FOR DIVISION.

2102 (2446). **Renting of lands; how made.**—The executor or administrator may rent the decedent's lands at public outcry, or, when the interest of the estate requires it, privately; and such rent is assets; but when lands are rented privately, he must report such renting to the probate court of the proper county within thirty days thereafter.

Must be executed in manner prescribed by statute.—Martin v. Williams, 18 Ala. 190 **Power for benefit of creditors.**—Clark v. Knox, 70 Ala. 609. **Liability of personal representative for failure to exercise.**—Pearson v. Darrington, 32 Ala. 227; James v. Faulk, 54 Ala 184; Benagh v. Turrentine, 60 Ala. 557; Henderson v. Simmons, 33 Ala. 291; Clark v. Knox, 70 Ala. 609. **Power exists when estate insolvent.**—Boynton v. McEwen, 36 Ala. 348. **Authority to receive rents on lease by decedent.**—Hawkins v. Pope, 10 Ala. 493. **Effect of statute on title and rights of heirs.**—Masterson v. Girard, 10 Ala. 60; Branch Bank v. Fry, 23 Ala. 770; Chighizola v. LeBaron, 21 Ala. 406; Smith v. Kyles, 22 Ala. 558; Nelson v. Murfee, 69 Ala. 598; Calhoun v. Fletcher, 63 Ala. 574. **As result of statutory system, personal representative may recover in ejectment.**—Golding v. Golding, 24 Ala. 122; Russell v. Erwin, 41 Ala. 292; McCullough v. Wise, 57 Ala. 623; McRae v. McDonald, Ib. 423; Morgan v. Casey, 73 Ala. 222; Landford v. Dunklin, 71 Ala. 594.

2103 (2447). **Sale for payment of debts when there is a will.**—Lands may be sold by the executor, or by the administrator with the will annexed, for the payment of debts, when the will gives no power to sell the same for that purpose, and the personal estate is insufficient therefor.

Jurisdiction to sell lands, for division or payment of debts, in rem.—Wyman v. Campbell, 6 Port. 219; King v. King, 29 Ala. 542; Satcher v. Satcher, 41 Ala. 26;

DeBardelaben v. Stoudenmire, 48 Ala. 643; Hamilton v. Hardy, 52 Ala. 291; Pettus v. McClannahan, Ib. 55; Garrett v. Bruner, 59 Ala. 513; Davis v. Tarver, 65 Ala. 98. **When, also, in personam.**—Garrett v. Bruner, 59 Ala. 513; Davis v. Tarver, 65 Ala. 98; Ford v. Ford, 68 Ala. 141. **Jurisdiction statutory and limited.** Wyman v. Campbell, 6 Port. 219; Cloud v. Barton, 14 Ala. 347; Matheson v. Hearin, 29 Ala. 210; Bishop v. Hampton, 15 Ala. 761; Satcher v. Satcher, 41 Ala. 26; Ala. Conference v. Price, 42 Ala. 39; Pettus v. McClannahan, 52 Ala. 55; Arnett v. Bailey, 60 Ala. 435; Wilburn v. McCalley, 63 Ala. 436; Tyson v. Brown, 64 Ala. 244; Robertson v. Robertson, 70 Ala. 385; s. c., 73 Ala. 116; Landford v. Dunklin, 71 Ala. 594; Gilchrist v. Shackelford, 72 Ala. 7; Sharp v. Sharp, 66 Ala. 312. **Jurisdictional facts must appear of record.**—See authorities above cited. **Jurisdiction attaches on filing petition, and decree cannot be collaterally impeached for mere irregularities.**—Wyman v. Campbell, 6 Port. 219; Duval v. McLoskey, 1 Ala. 708; Lightfoot v. Lewis, Ib. 475; Perkins v. Winter, 7 Ala. 855; Evans v. Mathews, 8 Ala. 99; Duval v. P. & M. Bank, 10 Ala. 636; Cox v. Davis, 17 Ala. 714; Bishop v. Hampton, 15 Ala. 761; Field v. Goldsby, 28 Ala. 218; Saltonstall v. Riley, Ib 164; King v. Kent, 29 Ala 542; Matheson v. Hearin, Ib. 210; Watson v. Collins, 37 Ala. 587; Satcher v. Satcher, 41 Ala. 26; Carter v. Waugh, 42 Ala. 452; Smitha v. Flournoy, 47 Ala. 345; Spragins v. Taylor, 48 Ala. 520; Clark v. Bernstein, 49 Ala. 596; Wright v. Ware, 50 Ala. 549; Hamilton v. Hardy, 52 Ala. 291; Bland v. Bowie, 53 Ala. 152; Arnett v. Bailey, 60 Ala. 435; Bibb v. Bishop, 61 Ala. 326; Wilburn v. McCalley, 63 Ala. 436; Landford v. Dunklin, 71 Ala. 594; Massey v. Smith, 73 Ala. 173; Foxworth v. White, 72 Ala. 224; Pollard v. Hanrick, 74 Ala. 334; May v. Marks, Ib. 249. **When decree of sale for payment of debts void.**—Ala. Conference v. Price, 42 Ala. 39; Tyson v. Brown, 64 Ala. 244; Bishop v. Hampton, 15 Ala. 761; Moseley v. Tuthill, 45 Ala. 621; Robertson v. Bradford, 70 Ala. 385; s. c., 73 Ala. 116; Wilburn v. McCalley, 63 Ala. 436. **When will confers power of sale.**—Winston v. Jones, 6 Ala. 550; McCollum v. McCollum, 33 Ala. 711; Ala. Conference v. Price, 42 Ala. 39. **When not.**—Walker v. Murphy, 34 Ala 591. **Sale made under void order not aided by power in will.**—Ala. Conference v. Price, 42 Ala. 39. **What title or estate may be sold.**—Brown v. Chambers, 12 Ala. 697; McCain v. McCain, Ib. 510; Burns v. Hamilton, 33 Ala. 210; McKay v. Broad, 70 Ala. 377; Evans v. Mathews, 8 Ala. 99; Jennings v. Jenkins, 9 Ala. 285; Bishop v. Blair, 36 Ala. 80; Fielder v. Childs, 73 Ala. 567; Inman v. Gibbs, 47 Ala. 305; Vaughan v. Holmes, 22 Ala. 593. **The will a limit on jurisdiction.**—Moseley v. Tuthill, 45 Ala. 621. **Decree not void because made in vacation.**—Matheson v. Hearin, 29 Ala. 210. **Nor because made at special term.**—Roach v. Gunter. 42 Ala 239. **Of what facts decree conclusive.**—May v. Marks, 74 Ala. 249; Landford v. Dunklin, 71 Ala. 594. **Chancery will decree sales,** when, in similar cases, probate court would have power to do so.—Sharp v. Sharp, 76 Ala. 312; Bragg v. Beers, 71 Ala. 151; Hall v. Wilson, 14 Ala. 295; Wilson v. Crook, 17 Ala. 59.

2104 (2448). **Sale in case of intestacy.**—In cases of intestacy, lands may be sold by the administrator for the payment of debts, when the personal estate is insufficient therefor.

See citations to preceding section.

2105 (2449). **Sale for division.**—Lands of an estate may be sold by order of the probate court having jurisdiction of the estate, when the same cannot be equitably divided among the heirs or devisees.

A child en ventre sa mere not an heir within statute.—Gillespie v. Nabors, 59 Ala. 441. **Petition showing one heir will not support decree.**—Ib. **Nor when it shows widow and one heir only.**—Snedicor v. Mobley, 47 Ala. 517. **Cases in which jurisdiction sustained on collateral attack.**—Carter v. Waugh, 42 Ala. 452; Pollard v. Hanrick, 74 Ala. 334; Satcher v. Satcher, 41 Ala. 26; Warnock v. Thomas, 48 Ala. 463; Watson v. Collins, 37 Ala. 587. **When not.**—Brock v. Frank, 51 Ala. 85; McCain v. McCain 12 Ala 510. See citations to section 2103.

2106 (2450, 2453). **Application; by whom and to whom made; contest.**—The application for the sale of lands, either for payment of debts or for division, must be made by the executor or administrator in writing, verified by affidavit, to the probate court having jurisdiction of the estate, must describe the lands accurately, must give the names of the heirs or devisees, and their places of residence, and must also state whether any, and which of such heirs or devisees are under the age of twenty-one years, or of unsound mind, or are married women; and such

application may be contested by any party interested in the estate.

Sufficiency of application.—Ford v. Garner, 49 Ala. 601; Quarles v. Campbell, 72 Ala. 66; Cloud v. Barton, 14 Ala. 347; Noles v. Noles, 40 Ala. 576; Page v. Matthews, 41 Ala. 719; Hoard v. Hoard, Ib. 591; Meadows v. Meadows, 73 Ala. 356; Inman v. Gibbs, 47 Ala. 305; King v. Kent, 29 Ala. 542; Sharp v. Sharp, 76 Ala. 312; Garrett v. Garrett, 64 Ala. 263; Gayle v. Johnston, 72 Ala. 254; DeBardelaben v. Stoudenmire, 48 Ala. 643; Avery v. Avery, 47 Ala. 505. **What good plea to application.**—Ford v. Garner, 49 Ala. 601; Rice v. Drennen, 75 Ala. 335; Watson v. Collins, 37 Ala. 587; Gayle v. Johnston, 72 Ala. 254; Garrett v. Garrett, 64 Ala. 263; Bond v. Smith, 2 Ala. 660. **What no answer.**—Rice v. Drennen, 75 Ala. 335. **Burden of proof on administrator.**—Davis v. Tarver, 65 Ala. 98; Garrett v. Garrett, 64 Ala. 263. **When minors interested, decree for division** should not be made unless it is shown to be to their interest.—Avery v. Avery, 47 Ala. 505.

2107 (2451, 2454). **Day fixed for trial; appointment of a guardian ad litem.**—The court must appoint a day, not less than forty days from the time of making such application, for the hearing thereof, and must appoint a proper person, not a petitioner or of kin to a petitioner, as guardian ad litem, to represent the minors or persons of unsound mind, if any there be, and must issue a citation to the heirs or devisees of full age and residing in this state, notifying them of the application, and of the day appointed for hearing the same, which must be served on them ten days before the day appointed for the hearing; and if any such heir or devisee is a married woman, the citation must be served on the husband as well as the wife.

Craig v. McGehee, 16 Ala. 41; Page v. Matthews, 41 Ala. 719; Summersett v. Summersett, 40 Ala. 596.

2108 (2451). **When notice given by publication.**—If such application be for the sale of land for the payment of debts, notice must also be given by publication, once a week for three successive weeks, in some newspaper published in the county, or by posting up notices at the court-house door and three other public places in the county, at the discretion of the court; but if no newspaper is published in the county, notices must be posted as above prescribed.

2109 (2452). **Publication as to non-residents.**—If any of the heirs or devisees reside out of this state, such heirs or devisees may be brought into court by publication, once a week for three successive weeks, in a newspaper published in the county in which the application is made, or if none is published therein, then in the newspaper published nearest to the court-house of such county.

2110 (2454). **Duty and authority of a guardian ad litem.** The persons appointed to represent minors or persons of unsound mind must deny in writing the allegations contained in the application, and, if necessary, must employ counsel to defend the interests of those he represents.

2111 (2455). **Sale for payment of debts; proof of insufficiency of personalty.**—On the day appointed for hearing an application for the sale of land for the payment of debts, or on any other day to which it is continued, the applicant must show to the court that the personal property of the estate is insufficient for the payment of debts; and such proof must be made by the deposition of disinterested witnesses, and filed and recorded.

Ford v. Garner, 49 Ala. 601; Davis v. Tarver, 65 Ala. 98; Quarles v. Campbell, 72 Ala. 64; Garrett v. Bruner, 59 Ala 513.

2112 (2456). **When order of sale granted.**—On the hearing

of such application, if the court is satisfied that the personal property of the estate is insufficient to pay the debts, and, when the application is by an executor or administrator with the will annexed, that no power is given by the will for that purpose, the court may direct the sale of all, or such portion of the real estate as may be necessary to pay the debts; and such sale may be had on such credit as the court may direct, not exceeding two years.

2113 (2457). **Sale of land for division; proof by deposition; order of sale.**—The facts stated in an application to sell land for distribution must be proved by the deposition of disinterested witnesses, which must be filed and recorded; and on such proof being made, the court may order a sale of the land, which must be sold on such terms as the court may direct, not exceeding a credit of three years.

2114 (2458). **When minors, etc., interested, proceedings void, unless testimony taken by deposition.**—No order for the sale of land belonging to any estate, whether for the payment of debts, or for division, must be made, when there are minors or persons of unsound mind interested in such estate, unless the probate court has taken evidence by deposition as in chancery proceedings, showing the necessity of such sale; and such evidence must be taken, whether the allegations in the petition are denied or not by the guardian appointed by the court to represent the minors or person of unsound mind; and any order of sale and sale, made without a compliance with the requisitions of this section, shall be wholly void.

Satcher v. Satcher, 41 Ala. 26; Pettus v. McClannahan 52 Ala. 55; Clark v. Bernstein, 49 Ala. 596; Wright v. Ware, 50 Ala. 549; Bland v. Bowie, 53 Ala. 152; Bibb v. Bishop, 61 Ala. 326; Robertson v. Bradford, 70 Ala. 385; Massey v. Smith, 73 Ala. 173; Quarles v. Campbell, 72 Ala. 64; Gilchrist v. Kirkland, Ib. 7.

2115 (2459). **When application to be dismissed; costs.**—If, on the hearing of the application, the facts are not proved, the same must be dismissed at the cost of the applicant, for which execution may issue against him and his sureties.

2116 (2460). **Advertisement of sale.**—When the application for the sale of land for the payment of debts or division is granted, and the land directed to be sold, the executor or administrator must give notice in the manner, and for the time, and under the regulations prescribed in section 2095 (2436).

Matheson v. Hearin, 29 Ala. 210; Field v. Goldsby, 28 Ala. 218; Pollard v. Hanrick, 74 Ala. 334.

2117 (2461). **How purchase-money secured.**—The executor or administrator must secure the purchase-money by taking the notes or bonds of the purchaser, with at least two sufficient sureties.

May v. Green, 75 Ala. 162.

2118 (2462). **Place of sale.**—Lands may be sold at such place in the county where they lie, as the court may direct; and if they lie in one body, but in more than one county, they may be sold in either of the counties, as the court may direct.

Matheson v. Hearin, 29 Ala. 210; Brown v. Brown, 41 Ala. 215; Calloway v. Kirkland, 57 Ala. 476; Cruikshank v. Luttrell, 67 Ala. 308.

As amended, Feb. 13, 1879, p. 77, sec. 1.

2119 (2463). **Return of sales to be made and examined.** The executor or administrator must, within thirty days after such sale, report on oath his proceedings to the court, who must

examine the same, and may also examine witnesses in relation thereto.

2120 (2464). **When sales set aside.**—If, on such examination, the court is satisfied that the sale was not fairly conducted, or that the amount for which the land, or any portion of the same, sold, was greatly less than its real value, the court may vacate such sale, either in whole or in part.

Duval v. P. & M. Bank, 10 Ala. 636; Field v. Gamble, 47 Ala. 443; Cruikshank v. Luttrell, 67 Ala. 318.

2121 (2465). **Sales not confirmed until sufficient security is given.**—If it is made to appear to the court, previous to the confirmation of such sale, that the sureties taken on the notes or bonds of the purchasers are insufficient, such sale, as to every such purchaser, must not be confirmed until he gives security for the purchase-money to the satisfaction of the court; and if such security is not given, the sale must be vacated as to the purchaser thus failing.

2122 (2466). **When re-sale to be made.**—When any sale of land is vacated, in whole or in part, according to the provisions of the two preceding sections, the court must direct another sale to be had, which must be advertised and conducted in all respects as is provided for the sale of land under the provisions of this article.

Cruikshank v. Luttrell, 67 Ala. 318; Field v. Gamble, 47 Ala. 443.

2123 (2467). **When sale confirmed.**—Whenever the court is satisfied that such sale was fairly conducted, and the land sold for an amount not greatly less than its real value, and the purchase-money is paid, or sufficiently secured, it must make an order confirming such sale; but such order of confirmation shall not be made until after the expiration of ten days after the report of sale is filed. Ib. sec. 2.

Lowe v. Guice, 69 Ala. 80; Landford v. Dunklin, 71 Ala. 595; Farley v. Dunklin, 76 Ala. 530; Smith v. West, 64 Ala. 34; Wallace v. Nichols, 56 Ala 321; Pollard v. Hanrick, 74 Ala. 334; Doe v. Hardy, 52 Ala. 291; Fields v. Childs, 73 Ala. 567; Lightfoot v. Doe, 1 Ala. 475; Bonner v. Greenlee, 6 Ala. 411; Stabler v. Spencer, 64 Ala. 496; Hudgens v. Cameron, 50 Ala. 379.

2124 (2468). **Conveyance; when, by whom, and to whom made.**—After such confirmation, and when the whole of the purchase-money has been paid by the purchaser, or his heirs, or any other person holding under him, directly or derivatively, on the application of such purchaser, or his heirs, or such other person holding under him, or of the executor or administrator, the court must order a conveyance to be made to such purchaser, or to his heirs, or to such other person holding under him, as the case may be, by the executor or administrator, or such other person as the court may appoint, conveying all the right, title and interest which the decedent had, at the time of his death, in such lands; and such order shall operate to vest the right, title and interest of the decedent in such purchaser, or his heirs, or such other person holding under him. Jan. 23, 1885, p. 95.

Dugger v Tayloe, 60 Ala. 504 (overruling s. c, 46 Ala. 320); Ketchum v. Creagh, 53 Ala. 224; May v. Marx, 74 Ala. 249.

2125. When purchaser or party claiming under him may cite executor or administrator to report sale.—If the executor or administrator fail, within the time required by law, to report any sale of lands made by him under the provisions of this March 1, 1881, p. 119, sec. 1.

article, the purchaser, or his heirs, or any other person claiming under him, directly or derivatively, may, by motion in the probate court, have citation to issue to such executor or administrator, citing him to appear within twenty day from the date of the service of the citation, and report the sale; and if such executor or administrator is then a non-resident of the state, or his place of residence is unknown to the party asking for the citation, the court, on affidavit being made of either of these facts, must cause service of such citation to be made by publication, once a week for three successive weeks, in some newspaper published in the county, or if none is published therein, in the newspaper published nearest the court-house of such county.

Robertson v. Bradford, 70 Ala. 385.

Ib. sec. 2.

2126. Proceedings when executor or administrator fails to obey citation.—If the executor or administrator fails to appear and report the sale, as required by such citation, the probate court must, on the day such executor or administrator is cited to appear, or on such other day as may be set by the court, proceed to hear evidence touching the regularity of the sale, the compliance with the terms of sale, and the adequacy of the price bid for the lands; and if from the evidence the court is satisfied that the sale was regular and fair, that the purchase-money has been paid or secured, according to the terms of sale, and that the amount bid at the sale is an adequate price for the lands, an order confirming the sale, and, if the sale was for cash, and the purchase-money has been paid, designating and authorizing some person to convey the title to the lands to the party entitled thereto, must be made.

2127 (2469). **With widow's consent, dower may be sold.** In all cases where, under the provisions of this article, the lands of a decedent can be ordered to be sold by the probate court, the widow may file in the office of the judge of probate her written consent, that her dower interest in the land may be sold, so as to vest in the purchaser the complete title; and thereupon, the court must order such dower interest to be sold with the residue of the lands.

Jenks v. Terrell, 73 Ala. 238; Bradford v. Bradford, 66 Ala 252.

2128 (2470, 2471). **Value of dower interest; how fixed and paid.**—When the sale is confirmed, the court, on the application of the widow, must make an order that a fair equivalent for the dower interest be paid to her by the personal representative, when the purchase-money is collected, the value of such interest to be ascertained by proof, having regard to the age and health of the widow, but in no case to exceed one-sixth of the purchase-money.

Gordon v. Rankin, 71 Ala. 202; Sherard v. Sherard, 33 Ala. 488.

As amended, Dec. 3, 1884, p. 76.

2129 (2472). **Mistake in description of lands sold under order of probate court; how corrected.**—When a mistake has been made in the description of lands of a decedent sold in good faith under an order of the probate court, either in the petition, order, or other proceedings, the court ordering the sale has authority, on the written application of the purchaser, or his heirs or personal representatives, or any person holding under him, verified by affidavit, to correct such mistake. The application must contain a correct description of the lands sold, and must

state the facts, and the names, ages and places of residence of the personal representative and heirs or devisees of such decedent, if known, and if there be no personal representative, that fact must be stated; and, upon the filing of such application, the court must appoint a day for the hearing, of which, and of the nature of the application, notice must be given, by personal service, to the personal representative of such decedent, and such of his heirs as are of age, and are of sound mind, if residents of the state, at least twenty days before the day appointed for the hearing, and also by publication, once a week for three successive weeks, in some newspaper published in the county, or if none is published therein, in a newspaper published nearest to the court-house thereof. If there is no personal representative of the estate of such decedent, the court must appoint an administrator ad litem to represent the estate in such proceeding; and the court must also appoint a guardian ad litem for such of the heirs or devisees as are under the age of twenty-one years, or are of unsound mind.

2130 (2472). **Decree on such application.**—If, upon the hearing, the court is satisfied from the evidence adduced, that the sale of such lands was made in good faith, and that a mistake was made in the description of the lands sold, as stated in the application, a decree must be made and entered, correcting the mistake; and if the purchase-money has been fully paid, and a deed executed, the court must order the personal representative, or, if there be none, the administrator ad litem, to execute to the party making the application a new deed, conveying to him the lands according to the description as corrected. Ib.

2131 (2473). **Evidence of title on application to sell lands.** In applications to the probate court for the sale of lands, the patent or deed shall be sufficient evidence to authorize the court to proceed and hear the application.

2132 (2507). **Jurisdiction to sell or divide land received on compromise.**—Real estate received by an executor or administrator in payment of any bad or doubtful claim, on a compromise of such claim made under an order of the probate court, may be distributed by the court having jurisdiction of the estate, by sale or division, upon the same proceedings as are had for the sale or division of real estate of decedents; but such real estate, or the proceeds thereof, if sold, must otherwise be treated and distributed as personal property.

CHAPTER 8.

SETTLEMENTS OF ADMINISTRATIONS; DISTRIBUTION OF ESTATES.

ARTICLE 1.—Settlements by executors and administrators, and distribution on final settlements.

2.—Payment of legacies, and partial distribution before final settlement.

ARTICLE I.

SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS, AND DISTRIBUTION OF FINAL SETTLEMENTS.

2133 (2508). **Partial settlements; when to be made.**—Every executor or administrator must make annual settlements of his administration; and he may, when necessary for the interests of the estate, be required to make a settlement at any time.

Jones v. Jones, 42 Ala. 218; Thompson v. Hunt, 22 Ala. 517; Smith v. Smith, 13 Ala. 329; McCreliss v. Hinkle, 17 Ala. 459.

2134 (2528). **Final settlement; when may be made.**—A final settlement may be made at any time after eighteen months from the grant of letters, if the debts are all paid, and the condition of the estate, in other respects, will admit of it.

Final settlement within eighteen months after grant of letters, void.—Matthews v. Douthitt, 27 Ala. 273. **Decree on final settlement.**—Merrill v. Jones, 2 Ala. 192; Jones v. Jemison, 4 Ala. 632; Davis v. Davis, 6 Ala. 611; Harrison v. Harrison, 9 Ala. 470; Shortridge v. Easley, 10 Ala. 520; Slatter v. Glover, 14 Ala. 648; Brazier v. King, 16 Ala. 730; Carroll v. Moore, 7 Ala. 615; Petty v. Wafford, 11 Ala. 143; Rhodes v. Turner, 21 Ala. 210; Hollis v. Caughman, 22 Ala. 478; Watson v. Hutto, 27 Ala. 513; Griffin v. Griffin, 40 Ala. 296; Cook v. Cook, 69 Ala. 294.

2135 (2509). **Settlements; account, vouchers and statement of heirs or legatees.**—In making settlements of an administration, the executor or administrator must proceed as follows:

1. He must make out an account between himself and the estate he represents, charging himself with all the assets of the deceased which have come into his possession, except the lands, and crediting himself with all the credits he is by law entitled to; which account, verified by his oath, must be filed with the judge of probate of the court having jurisdiction.

2. With such account he must also file the vouchers and written evidence in his possession, on which he relies to sustain the credit side of such account.

3. He must, at the same time, file a statement, on oath, of the names of the heirs and legatees of such estate, specifying particularly which are under the age of twenty-one years; and if any of them are married women or persons of unsound mind, it must be stated; but if the names, ages, or condition of such heirs or legatees are unknown, and they reside out of the state, they may be made parties as unknown heirs or legatees.

Statement of heirs, and parties to settlements.—Boyett v. Kerr, 7 Ala. 9; Eddings v. Long, 10 Ala. 203; Reynolds v Reynolds, 11 Ala. 1023; Hall v. Andrews, 17 Ala. 40; McConico v. Cannon, 25 Ala. 462; Thomas v. Dumas, 30 Ala. 83; Hutton v. Williams, 60 Ala. 107; Otis v. Dargan, 53 Ala. 178.

2136 (2511). **Damages for failure to file such statement.** If such statement is not filed, the executor or administrator and his sureties are liable for all damages arising therefrom.

2137 (2510). **Appointment of guardian ad litem.** — The court must appoint a competent person as guardian ad litem to represent the interests of minors, and persons of unsound mind, interested in such settlement.

Jenkins v. Jenkins, 16 Ala. 693; Clack v. Clack, 20 Ala. 461; Smith v. Smith, 21 Ala. 761; King v. Collins, Ib. 363; Morgan v. Morgan, 35 Ala. 303; Searcy v. Holmes, 43 Ala. 608; Petty v. Britt, 46 Ala. 491; Stabler v. Cook, 57 Ala. 22; Morris v. Morris, 58 Ala. 443; Hutton v. Williams, 60 Ala 133; Travick v. Travick, 67 Ala. 271; Hatcher v. Dillard, 70 Ala. 343.

2138 (2512). **Day appointed for settlement; notice.**—Upon the filing of such account, vouchers, evidence and statement, the judge of probate must appoint a day for such settlement, and must give notice of the same by publication in some newspaper published in the county, for three successive weeks; or, if none is published therein, by posting such notice at the court-house and three other public places in such county, for the same length of time; but if the settlement be only an annual one, publication shall only be given by posting up notices as above provided.

Williamson v. Hill, 6 Port. 184; Jenkins v. Jenkins, 16 Ala. 693; Frierson v. Travis, 39 Ala. 153; Bruce v. Strickland, 47 Ala. 192; Otis v. Dargan, 53 Ala. 178; Carter v. Carter, Ib. 369; Stabler v. Cook, 57 Ala. 22; McRee v. McRee, 34 Ala. 165.

2139 (2513). **Contents of notice.**—Such notice must state the name of the executor or administrator, the name of the deceased, the day appointed for settlement, and the nature of the settlement, whether annual or final.

King v. Collins, 21 Ala. 363; Sims v. Waters, 65 Ala. 442.

2140 (2514). **On waiver of publication, notice given by posting.**—If the heirs or legatees are of age, and waive publication in a newspaper, notice must, in such case, be given by posting the same at the court-house door.

2141 (2515, 2516, 2517). **Auditing of account; proof of credits.**—On the day appointed, or any other day to which the settlement is continued, the court must proceed to examine and audit the account; and, on such auditing, the executor or administrator must produce satisfactory proof of the correctness of each item on the credit side of the account, which may be made by the affidavit or oral examination of witnesses, or by any other legal evidence.

Day appointed for settlement.—McRee v. McRee, 34 Ala. 165. **Proof of credits claimed by representative.**—Landreth v. Landreth, 9 Ala. 430; Savage v. Benham, 11 Ala. 49; Gaunt v. Tucker, 18 Ala. 27; Pearson v. Darrington, 32 Ala. 228; Henderson v. Simmons, 33 Ala. 291; Morgan v. Morgan, 35 Ala. 303; Wright v. Wright, 64 Ala. 88; Jenks v. Terrell, 73 Ala. 239.

2142 (2520). **Liability for interest or profits; exculpatory oath.**—If any executor or administrator uses any of the funds of the estate for his own benefit, he is accountable for any profit made thereon, or legal interest; and in making out his account for a settlement, he must state the sum so used, the time, and the profit resulting from such use, if over legal interest; or he must expressly deny on oath that he has so used such funds; and any party interested may contest the same.

Brazeale v. Brazeale, 9 Ala. 491; Parker v. McGaha, 11 Ala. 521; King v. Cabaniss, 12 Ala 598; McCreliss v. Hinkle, 17 Ala. 459; Clack v. Clack. 20 Ala. 461; Hollis v. Caughman, 22 Ala. 478; Bendall v. Bendall, 24 Ala. 295; Farmer v. Farmer, 26 Ala. 671; Roundtree v. Snodgrass, 36 Ala. 185; Harrison v. Harrison, 39 Ala. 489; Ivey v. Coleman, 42 Ala. 409; Nunn v. Nunn, 66 Ala. 35; Clark v.

Knox, 70 Ala. 608; Clark v. Hughes, 71 Ala. 163; May v. Green, 75 Ala. 162; Englehart v. Young, 76 Ala. 535.

2143 (2519). **Contest of account; evidence in support thereof.**—Any person interested may appear and contest any item of the account, and may examine the executor or administrator, or any other witness, and may introduce any legal evidence, in support of his contest.

Owens v. Thurmond, 40 Ala. 289.

2144 (2519). **Depositions; how taken, and when admissible.** The depositions of witnesses may be taken on interrogatories, and read in evidence, by any party to the settlement, in the same cases, for the same causes, and under the same rules, as depositions are taken and read in civil actions in common-law courts.

2145 (2521). **Costs of contest; by whom paid.**—If any item, as charged by the executor or administrator, is reduced or not allowed, the costs of the contest in relation to such item must be paid by the executor or administrator; otherwise, by the party contesting.

Jones v. Dever, 16 Ala. 221; Henderson v. Renfro, 31 Ala. 101; Moody v. Hemphill, 71 Ala. 169.

2146 (2522). **Items may be withdrawn on paying costs.** The executor or administrator may, before the decision of the court on any item, withdraw the same; but in such case he must pay the costs of the contest as to such item.

2147 (2523). **Account to be stated and recorded.**—On auditing the account, the court must state the same, and render a decree passing it as stated; and the same must be recorded.

Bendall v. Bendall, 24 Ala. 295.

2148 (2529). **Proceedings, etc., when representative guardian of distributee.**—The jurisdiction of the probate court to make partial or final settlements or distributions of the estates of decedents, is not affected by the fact that the executor or administrator making the settlement is also guardian of any heir or distributee, devisee, or legatee of the decedent; but in such case, the court must appoint a special guardian, without bond, to represent such heir or distributee, devisee, or legatee, on the settlement and distribution; and upon final settlement, any decree to which such ward may be entitled must be rendered against the executor or administrator in the name of the special guardian, for the use of the ward; and thereafter the executor or administrator, in the capacity of guardian, shall be accountable for such decree. The special guardian shall be entitled to reasonable compensation for his services, and for the services of counsel properly employed, to be allowed by the court, and to be paid by such general guardian out of the estate of the ward.

2149 (2531). **Previous settlements presumed to be correct.** Upon the final settlement, any item of account included in any previous settlement may be re-examined; but its allowance in the previous settlement is presumptive evidence of its correctness.

Smith v. Smith, 13 Ala. 329; Newberry v. Newberry, 28 Ala 691; Holman v. Sims, 39 Ala. 709; Jones v. Jones, 42 Ala. 218; Ditmar v. Bogle, 53 Ala. 169; Radford v. Morris, 66 Ala. 283; Tayloe v. Bush, 75 Ala. 432.

2150 (2532). **When representative chargeable with other**

items.—Upon final settlement, any person contesting may also show that the executor or administrator has failed to charge himself with, or to account for all the assets of the decedent received by him, or that he has failed to collect the same, or any portion thereof; or that by an abuse of, or failure to discharge his trust, such assets, or any portion thereof, have been depreciated, injured, or destroyed.

2151 (2533). **Compensation to executors or administrators.** Executors and administrators may be allowed such commissions on all receipts and disbursements by them, as such, as may appear to the probate court a fair compensation for their trouble, risk and responsibility, not to exceed two and one-half per cent. on the receipts, and the same percentage on the disbursements; and the court may also allow actual expenses, and, for special or extraordinary services, such compensation as is just.

Commissions on receipts and disbursements.—Allen v. Martin, 34 Ala. 442; Wright v. Wilkerson, 41 Ala. 267; Moore v. Randolph, 70 Ala. 576; Newberry v. Newberry, 28 Ala. 691; Neilson v. Cook, 40 Ala 498. **Includes special administrators.**—Wright v. Wilkinson, 41 Ala. 267. "**Receipts**" **means pecuniary assets only.**—Ib. **To deprive personal representative of his compensation,** he must have been guilty of gross negligence, or willful default, resulting in injury to the estate. Smith v. Kennard, 38 Ala. 695; Neilson v. Cook, 40 Ala. 498; Powell v. Powell, 10 Ala. 900; Ivey v. Coleman, 42 Ala. 409; Henderson v. Simmons, 33 Ala. 291; Craig v. McGehee, 16 Ala. 41; Gould v. Hays, 19 Ala. 438; Stewart v. Stewart, 31 Ala. 207; Hall v. Wilson, 14 Ala. 295; Pearson v. Darrington, 32 Ala. 231. **Expenses.**—Phillips v. Thompson, 9 Port. 664; Pearson v. Darrington, 32 Ala. 231. **Compensation for special or extraordinary services.**—Ashurst v. Ashurst, 13 Ala. 782; Gould v. Hays, 25 Ala. 426; Reese v. Gresham, 29 Ala. 91; Holman v. Sims, 39 Ala. 709; Dockery v. McDowell, 40 Ala. 476; Ivey v. Coleman, 42 Ala. 409; Waller v. Ray, 48 Ala. 468; Hinson v. Williamson, 74 Ala. 180. **When allowed for services as an attorney.**—Harris v. Martin, 9 Ala. 895; Bendall v. Bendall, 24 Ala. 295; Bates v. Vary, 40 Ala. 422; Teague v. Corbitt, 57 Ala. 529; Moore v. Randolph, 70 Ala. 576; Clark v. Knox, Ib. 608.

2152 (2534). **Commissions on property and money distributed.**—Upon the appraised value of all personal property, and the amount of money and solvent notes distributed by executors or administrators, they shall be allowed the same commissions as upon disbursements.

2153 (2535). **How personal property of estate of inhabitant of another state disposed of.**—When administration is taken out in this state on the estate of any person who, at the time of his death, was an inhabitant of any other state or country, his personal estate, after the payment of debts and charges on his estate, must be disposed of according to his last will, if probated in this state; and if no such will is probated in this state, according to the law of the state or country of which he was an inhabitant.

2154 (2536). **Distribution of such estate.**—Upon the settlement of such estate, and after the payment of all debts for which the same is liable in this state, the residue of the personal estate may be distributed and disposed of according to the provisions of the preceding section; or it may be transmitted or paid over to the executor or administrator of the state or country where the deceased had his domicil.

2155 (2524). **When settlement compelled by attachment, or account stated by court.**—Any executor or administrator may be required by citation to file his accounts and vouchers, and to make a settlement; and if, after service of the citation, he fails to file his accounts and vouchers for a settlement by the

day named in the citation, the probate court may compel him to do so by attachment, or may proceed to state the account against him from the materials on file, or such other information as may be accessible, charging him with such assets as may have come to his hands.

Blackwell v. Vastbinder, 6 Ala. 218; Vincent v. Daniel, 59 Ala. 602; Cook v. Cook, 69 Ala. 294.

2156 (2525, 2526). **When account stated, to be audited and re-stated; citation and notice.**—After stating such account, the court must issue citation to such executor or administrator, to appear on a day therein named, and file his accounts and vouchers for settlement, or that the account so stated will be passed, which must be served on him at least ten days before the day named therein; and must also give notice of such settlement by publication, as in case of settlements voluntarily made by executors and administrators; and if, on the day named, such executor or administrator fails to appear and file his accounts and vouchers for settlement, as required by law, the court must proceed to examine the account so stated, and audit, and, if necessary, re-state the same.

Sankey v. Sankey, 6 Ala. 607; Duffee v. Buchanan, 8 Ala. 27; Petty v. Wafford, 11 Ala. 143; Ashley v. Ashley, 15 Ala. 15; Harrison v. Harrison, 9 Ala. 470; Ditmar v. Bogle, 53 Ala. 169; George v. Goldsby, 23 Ala. 326; Vincent v. Daniel, 59 Ala. 602; May v. Carlisle, 68 Ala. 135; Hooper v. Smith, 57 Ala. 557.

2157. Proceedings on settlement of such account.—On the day appointed for auditing such account, any person may attend on the part of such executor or administrator, and show that he is entitled to additional credits; and any person interested may attend and contest any item of such account, or in any previous account; or may show assets not accounted for; or that such executor or administrator has failed to collect any assets from want of due diligence; or that, by any abuse of, or failure to discharge his trust, such assets, or any portion thereof, have been injured, destroyed, or depreciated; and in case of such proof, the executor or administrator must be charged therewith; and upon such settlements, decrees must be rendered as upon settlements voluntarily made.

Carroll v. Moore, 7 Ala. 615; Cook v. Cook, 69 Ala. 294.

2158 (2527). **Decree set aside on filing accounts before settlement.**—If, however, such executor or administrator appears and files his accounts and vouchers for settlement, and pays such costs as have accrued upon the proceedings had under the three preceding sections, the court may set aside such decree, and proceed as if none had been rendered.

2159 (2644). **When credit allowed for expenses of minor distributees.**—When the estate of a decedent is solvent, the executor or administrator, out of the assets in his hands, may defray the necessary and reasonable expenses of maintaining and educating minors who are entitled to distribution therein, and who have no legal guardian; and upon any partial or final settlement by him, the probate court must allow him credit for such expenses, to be charged against the shares of such minors, and deducted therefrom on any distribution of the estate.

2160 (2645). **Separate accounts and vouchers for such expenses.**—An executor or administrator, defraying such expenses, must file with his account for a settlement a separate account of

the amounts paid therefor on account of each of such minors, accompanied by proper vouchers, showing the amounts, and for what expended.

2161 (2530). **Distribution to be made on final settlement.** On the final settlement of an estate, the court may make such orders of distribution as may be necessary; and, on the confirmation of the same, may render a decree thereon, and the property must be delivered according to such decree; or if there is money only to be divided, it may render a decree in favor of each distributee entitled to the same, for his distributive share, against the executor or administrator.

Parties to, and decrees on settlement.—Davis v. Davis, 6 Ala. 611; Sankey v. Sankey, Ib. 607; Graham v. Abercrombie, 8 Ala. 552; Key v. Vaughn, 15 Ala. 497; Green v. Fagan, Ib. 335; Kavanaugh v. Thompson, 16 Ala. 817; Reynolds v. Reynolds, 11 Ala. 1023; Thomas v. Dumas, 30 Ala. 83; Simmons v. Knight, 35 Ala. 105. See, also, citations to 2134.

2162 (2496). **Orders of distribution; by whom executed.** All orders of distribution must be directed to five disinterested persons appointed by the court, must specify the property to be divided, the persons, and their respective shares, and must require them to return their proceedings on a day specified in such order.

2163 (2497). **Distribution to be made and returned.**—The persons therein named, or a majority of them, must proceed to make distribution according to such order, having first taken an oath to make such distribution fairly and impartially, if the same can be made, which oath may be administered by the executor or administrator, and must return their proceedings in writing, signed by them, to the court by the day specified in such order.

2164 (2498) **When property cannot be divided.**—If the property cannot be divided equitably without a sale of all or some portion thereof, the commissioners must so report.

2165 (2499). **Exceptions to commissioners' report.**—Any person may file exceptions to the report of the commissioners within thirty day after the day appointed for the return; or if returned at any time thereafter, within thirty days after the return.

2166 (2500). **Distribution set aside or confirmed; when sale of property ordered.**—The court, for cause shown on such exceptions, or otherwise, may set aside such distribution and direct another distribution; or, if the same is just, may confirm it; or, if it appears from such report that the property cannot be equitably divided without a sale of all or some portion thereof, it may direct a sale of all, or any portion of the personal property.

Hamlet v. Johnson, 26 Ala. 557.

2167 (2501). **Sale; how advertised and made.**—Such a sale must be advertised and made as sales of personal property under the order of the court for the payment of debts.

2168 (2502). **Property delivered on confirmation.**—Upon the confirmation of any order of distribution, the executor or administrator must deliver the property to the persons entitled thereto.

2169 (2503). **Division of claims.**—Any judgments or claims in favor of the estate, which are not collected at the time of final distribution, may be divided among the persons entitled,

on final distribution; or, if such division cannot be equitably made, may be sold as other personal property.

Oflutt v. Vance, 42 Ala. 234.

2170 (2504). **Assignment of such judgments or claims.** The executor or administrator must assign any such judgment or claim to the distributee, legatee, or purchaser, as the case may be; and such person is entitled to collect the same by suit or otherwise.

Feb. 13, 1879, p. 186.

2171. When indebtedness of distributees set off against their shares; defense.—If, on final settlement, any distributee or legatee owes the estate any debt, contracted with the decedent in his life-time, or with the executor or administrator in his representative capacity, the court shall allow the same in favor of the executor or administrator, as a set-off against the distributive share of such distributee or legatee, and shall decree satisfaction of his distributive share to the extent of such debt or demand; but the distributee or legatee may make any defense to the set-off that would be available to him in a direct proceeding for the recovery of the debt.

Ib.

2172. No judgment, in such case, for excess; but balance may be collected by suit.—In no case, however, shall a decree be rendered in favor of the executor or administrator against such distributee or legatee for the excess, when the debt is greater in amount than the distributive share; nor shall the executor or administrator be prevented from prosecuting a suit in the proper court for any excess that may be due him from such distributee or legatee.

2173 (2537, 2590). **Settlement after representative's death, removal, or resignation.**—When an executor or administrator dies, resigns, or is removed, or his letters are revoked, or his authority ceases from any cause, he must, within one month after his authority ceases, or, in case of his death, his personal representative must, within six months after the grant of letters, file his accounts, vouchers and statement of the heirs and legatees for, and must make final settlement of the administration of such executor or administrator; of which settlement notice must be given in the same manner, and such settlement must be conducted and governed, except as herein otherwise provided, by the same rules and provisions of law, as other final settlements by executors or administrators.

Stallworth v. Farnham, 64 Ala. 259; Glenn v. Billingslea, Ib 345; Hatchett v. Billingslea, 65 Ala. 16; Buchanan v. Thomason, 70 Ala. 401; Cook v. Cook, 69 Ala. 294; Hays v. Cockrell, 41 Ala. 75; Waller v Ray, 48 Ala. 468; Whitworth v. Oliver, 39 Ala. 286; Martin v. Ellerbee, 70 Ala. 340.

2174 (2538). **Remaining or succeeding executor or administrator a party; notice.**—The remaining or succeeding executor or administrator of the estate of the decedent, if there be one, must be made a party to such settlement, and, if a resident of this state, must have personal notice of the time of making the same served on him, at least ten days before the day appointed therefor.

See citations to preceding section.

As amended, Jan. 27, 1883, p. 31.

2175 (2591). **Decree against representative for balance.** If there remains any act of administration to be done, other than making settlement and distribution, or payment of lega-

cies, and there is a remaining or succeeding executor or administrator, a decree must be rendered in his favor for the amount found due on such settlement, and for the delivery of any personal property in the hands of the executor or administrator whose authority has ceased, or, if dead, of his personal representative; but if more than eighteen months have elapsed from the original grant of letters, and there remains no other act of administration to be done than making distribution or payment of legacies, and the estate is solvent, the court must at once proceed to decree distribution or payment of legacies directly to those entitled; or, if in the case last mentioned there are money assets in the hands of the outgoing executor or administrator, or, if dead, of his personal representative, in excess of a sum sufficient for the payment of debts and expenses of further administration, such excess must be distributed, or legacies paid therefrom, directly to those entitled, without passing through the hands of the remaining or succeeding administrator.

2176 (2539). **Decree against remaining or succeeding executor or administrator.**—If, on such settlement, a balance is ascertained to be due from the estate of such decedent to the deceased or outgoing executor or administrator, the probate court may, if eighteen months have elapsed from the grant of original letters, render a decree in favor of the outgoing executor or administrator, or, if dead, of his personal representative, against the remaining or succeeding executor or administrator, for such balance; and if the estate is solvent, payment thereof may be enforced by execution against him, to be levied of any effects of such estate in his hands unadministered; but if the estate is insolvent, such decree is to be paid as other claims against insolvent estates; and if such balance, or any part thereof, is for expenses of administration necessarily incurred, such balance, or such part thereof as may be for such expenses, shall be a preferred claim against such estate, and shall be paid as other preferred claims are paid.

Cunningham v. Beard, 44 Ala. 317.

2177 (2540). **When execution may be stayed.**—The probate court may stay execution on any decree rendered under the provisions of the preceding section, for any time, not exceeding six months, if, in the judgment of the court, the interest of the estate requires extension.

Cunningham v. Beard, 44 Ala. 317.

2178 (2592). **Settlement against outgoing or deceased representative compelled, or account stated.**—If such outgoing executor or administrator, or, if dead, his personal representative, fails to make settlement within the time required by this article, the court may, of its own motion, or on the application of any party in interest, compel him to do so by attachment, or may state the account against him from the materials on file, or such other information as may be accessible to the court, charging him, or his personal representative, with such assets as may have come to the hands of such executor or administrator.

2179 (2593). **When account examined, audited and re-stated; notice and citation.**—After stating such account, the court must issue citation to such executor or administrator, or if

dead, to his personal representative, to appear on a day therein named, and file his account and vouchers for settlement, or that the account so stated will be passed, which must be served on him, or if dead, on his personal representative, at least ten days before the day named therein; and must also give notice of such settlement by publication, as in case of final settlements voluntarily made by executors or administrators; and if, on the day named, such executor or administrator, or if dead, his personal representative, fails to appear and file his accounts and vouchers for settlement, as required by law, the court must proceed to examine the account, audit and, if necessary, re-state the same.

2180 (2594). **Proceedings on final settlement of such account.**—On the day appointed for auditing such account, any person may attend, on the part of such executor or administrator, or if dead, of his personal representative, and show that he is entitled to additional credits; and any person interested may attend and contest any item of such account, or in any previous account; or may show assets not accounted for; or that such executor or administrator has failed to collect any assets from want of due diligence; or that, by any abuse of, or failure to discharge his trust, such assets, or any portion thereof, have been injured, destroyed, or depreciated; and in case of such proof, the executor or administrator, or if dead, his personal representative, must be charged therewith. On such settlements, decrees must be rendered as upon like settements voluntarily made.

2181. Decree set aside on filing accounts before settlement. If, however, such executor or administrator, or if dead, his personal representative, appears and files his accounts and vouchers for settlement, and pays such costs as have accrued upon the proceedings had under the three preceding sections, the court may set aside such decree, and proceed as if none had been rendered.

2182 (2596). **Proceedings no bar to other suits.**—The proceedings for the settlement of the accounts of deceased or outgoing executors or administrators, provided for in this article, do not prevent any action by the remaining or succeeding executor or administrator, or by any other person entitled thereto, against such executor or administrator, or his personal representative, for any property remaining in his hands, or for any other cause of action.

2183 (2541). **Arbitration of controversies on settlement of estates.**—On the settlement of the estate of a decedent, when such estate is free from debt, the probate court in which such settlement may be pending has authority to refer all matters of controversy arising in such settlement to arbitration, if, in the opinion of the court, the interests of the parties can be best subserved thereby, and the parties, or their attorneys, consent thereto.

2184 (2542). **Guardian may consent for ward.**—If any person interested in such estate be an infant, or of unsound mind, his guardian shall have authority to consent to the reference to arbitration, which consent must be in writing, and when so given, shall be binding on such infant as fully and effectually as if he was of full age.

2185. (2543). **Number and qualifications of arbitrators.** The arbitrators must not exceed three in number, and must be entirely disinterested, and must be appointed by order of the probate court.

2186 (2544). **Award to be made in writing.**—The arbitrators must make their award in writing, and, within ten days after making the same, they must return it to such court; and, if approved by the court, it must be entered of record, and shall be final and conclusive upon all the parties.

2187 (2545). **When award to have effect of a judgment.** If such award, or any part thereof, be for the payment of money, it shall, when approved and entered of record, have the force and effect of a judgment at law in favor of the person to whom the money may be awarded; and execution may issue thereon as in other cases.

2188 (2546). **When award may be set aside.**—If such award be not approved by the court, it must be set aside; and the court may refer the matters again to the same or other arbitrators.

2189 (2547). **Objections to award; proceedings thereon.** Any of the parties may, within ten days after such award has been returned to the court, file objections to the same; and if objections are filed, the court must appoint a day, not less than thirty days from the filing of such objections, to hear and determine the same, notice of which must be given as now required by law in cases of applications for final settlements of the estates of decedents by executors or administrators.

2190 (2548). **Sections applicable.** — Sections 3224 (3539), 3225 (3540), 3227 (3542), 3228 (3543), 3229 (3544), 3230 (3545), 3231 (3546), and 3235 (3549) of this Code, are applicable to the settlement of estates by arbitration.

ARTICLE II.

PAYMENT OF LEGACIES, AND PARTIAL DISTRIBUTION BEFORE FINAL SETTLEMENT.

2191 (2474). **Distribution before final settlement.**—When the executor or administrator is satisfied that the estate is solvent, he may, at any time, so report it, and obtain an order of distribution as to the whole, or any part of the property; but in such case, if the order is made before a final settlement of such estate, the order and proceedings thereon are not a defense in any action brought against such executor or administrator as such.

Williamson v. Mason, 18 Ala. 87.

2192 (2475). **When payment of legacies may be compelled.**—After the expiration of eighteen months from the grant of letters testamentary, or of administration with the will annexed, if there are more than sufficient assets in the hands of such executor or administrator to pay the debts of the deceased, any legatee may apply to the probate court of the county in which letters were granted, to compel the payment of his legacy; and a widow who has dissented from her husband's will, or her personal representative, if she is dead, shall have like remedy to

compel the payment of the distributive share to which she may be entitled.

Smith v. Hall, 20 Ala. 777; Chighizola v. LeBaron, 21 Ala. 406; McReynolds v. Jones, 30 Ala. 101; McAllister v. Thompson, 32 Ala. 497.

2193 (2476). **Contents of application.**—The application for such purpose must be in writing, verified by affidavit, must set forth the applicant's claim, and must allege a sufficiency of assets in the hands of such executor or administrator to pay the same, after discharging the debts of the testator, charges on his estate, and other legacies entitled to priority of payment.

2194 (2477). **Day fixed for hearing; citation to representative.**—The court must appoint a day for hearing such application, and a citation must be issued and served on the executor or administrator, notifying him of the grounds of such application, and of the day appointed for hearing the same, ten days before such day.

2195 (2478). **When court may direct payment of legacy, on giving refunding bond.**—On the day appointed, or on any other day to which the hearing of the application may be continued, the court must hear the same, and if it appears that the applicant is a legatee, and that, after the payment of his legacy, there will be a sufficiency of assets to pay all the debts which have been presented, charges and other legacies which are entitled to priority, the court may direct the payment or delivery of such legacy, or any part thereof, according to the proof of assets, and of the other legacies in the same degree with that of the applicant, on the legatee executing a refunding bond according to the provisions of the next section.

2196 (2479). **Terms and conditions of refunding bond.** Such refunding bond must be payable to the executor, or administrator with the will annexed, and must be in double the amount directed to be paid, or in double the value of the property to be delivered, to be ascertained by the appraisement or other evidence satisfactory to the court, with at least two sufficient sureties, conditioned to refund the amount paid, or to return the property, or pay the value thereof, with interest on such amount or value from the time the same was received, should the assets prove insufficient to discharge the other debts presented, and charges, and other legacies entitled to priority of payment.

Johnston v. Fort, 30 Ala. 78.

2197 (2481). **How payment of legacy enforced.**—If the legacy is not payable in money, the value thereof, as ascertained under the preceding section, must be entered of record; and if the amount directed to be paid, or the property directed to be delivered, is not paid or delivered within sixty days after such order, an execution may issue for such amount, or the value of such property, against such executor, or administrator, and his sureties.

2198 (2480). **What provisions applicable to widow.**—The five sections next preceding apply to the widow who has dissented from her husband's will, and seeks to compel the payment of her distributive share, or if she is dead, to her administrator or executor.

2199 (2482). **Distribution made on application after eight-**

een months.—The court may also, in cases of intestacy, make an order of distribution out of the assets of the decedent, on the application of any person entitled to distribution, after eighteen months from the grant of letters.

Harrison v. Harrison, 9 Ala. 470; Sankey v. Elsberry, 10 Ala. 455; Harrison v. Meadors, 41 Ala. 274; Ward v. Oates, 42 Ala. 228; Johnston v. Fort, 30 Ala. 78.

2200 (2483). **Contents of application.**—Such application must be in writing, verified by affidavit; must specify the share to which the applicant is entitled, and must allege that the assets of the decedent are more than sufficient to pay the debts of the decedent, and the charges on his estate.

2201 (2484). **Day fixed for hearing; citation.**—A day must be appointed for the hearing of such application, and a citation must be issued and served on the administrator ten days before the day appointed, notifying him of the grounds of the application, and the day of hearing the same.

Harrison v. Meadors, 41 Ala. 274.

2202 (2485, 2486). **Order of distribution; when made.**—On the day appointed, or on any other day to which the application may be continued, if the court is satisfied from the evidence that the assets are more than sufficient to pay the debts and charges, it may make an order of distribution for such portion of the distributive share of the applicant as may be authorized by the evidence; but in making such order, the court must not exceed the share to which the applicant would be entitled on a final settlement and distribution.

Harrison v. Meadors, 41 Ala. 274.

2203 (2486). **Order made on giving refunding bond; terms and conditions of such bond.**—Such order must not in any case be made, unless the applicant give a refunding bond, with two sufficient sureties, to be approved by the judge of probate, payable to the administrator, in double the amount distributed to the applicant, or in double the value of his share of the property directed to be distributed, to be ascertained by the appraisement or other evidence, and entered of record, and conditioned to refund the amount directed to be paid, or to return the property received on such distribution, or to pay the value thereof and interest on such amount or value from the time the same was received, if the assets are insufficient to discharge the debts and charges against the estate.

Johnston v. Fort, 30 Ala. 78.

2204 (2487). **Costs.**—If any application made under the provisions of this article is determined against the applicant, he must pay the costs.

2205 (2488). **Bond recorded; transcript evidence.**—All refunding bonds provided for in this article must be recorded by the judge of probate, and then delivered to the executor or administrator; and a transcript of any such bond as recorded, duly certified, is evidence to the same extent as the original would have been, if produced.

2206 (2489, 2490). **For whom such bond a security.**—Such refunding bond stands as security for the executor or administrator, should the assets in his hands, after any payment of money or delivery of property under the order of the court, prove insufficient to pay the debts, claims and charges against the estate,

and the executor or administrator pays the same; and also as security for the creditors of the estate; and any creditor may sue thereon.

Alexander v. Fisher, 18 Ala. 374.

2207 (2491). **Suits and recoveries on such bond.**—The extent of the recoveries on such bond is the amount or value of property received by the legatee or distributee, and interest on such amount or value from the date of its receipt; and the value of property received may be proved by the entry of record, made according to the provisions of this article, or other evidence; and such bond may be sued on from time to time, in the name of any person aggrieved, until the whole amount of the liability, as determined by this section, is recovered.

2208 (2492). **Rights of parties to such bonds among themselves.**—Any party making a payment on any refunding bond taken under this article may recover against the parties to any other refunding bond such an amount as shall be in the same proportion to the amount collected from the plaintiff, as the amount of money and value of the property delivered on both bonds bear to the amount of money or property delivered on the bond of the defendant.

2209 (2493). **Order made after eighteen months protects representative.**—The order of the court, made after eighteen months from the grant of letters, on the application of any legatee or person entitled to distribution, is a protection to the executor or administrator, to the extent of the amount or value of the legacy or share ordered to be paid or distributed.

CHAPTER 9.

KEEPING ESTATES TOGETHER.

2210 (2602). **Continuing plantation and employing laborers.**—The probate court may authorize the executor or administrator, on application made, and good cause shown, to keep the real and personal estate, or any portion thereof, together for such length of time as the court may deem advisable, not exceeding ten years, and employ laborers to cultivate, improve, keep in repair, and carry on the plantation belonging to the estate.

Steele v. Knox, 10 Ala. 608; Craig v. McGehee, 16 Ala. 41; Gerald v. Bunkley, 17 Ala. 170; Stewart v. Stewart, 31 Ala. 207; Pickens v. Pickens, 35 Ala. 442; Harrison v. Harrison, 39 Ala. 489; Glenn v. Glenn, 41 Ala. 571; Hinson v. Williamson, 74 Ala. 194.

2211 (2603). **Time extended for good cause shown.**—Whenever any executor or administrator has kept an estate together, under the order of the probate court, for ten years, the time may be extended annually, upon application and good cause shown, if the court is of the opinion that the interest of such estate demands such extension.

2212 (2604). **When distributed share kept and worked with undivided portion of estate.**—When a share or shares of real or personal property of any decedent is or are set apart or

distributed to any widow, heir at law, or distributee of such decedent, and it appears to the satisfaction of the court that it is to the interest of the parties interested in the estate that such share or shares should be kept and worked together with such estate remaining undivided, the probate court, upon the application of the executor or administrator, and of the owner or owners of such share or shares, may order the executor or administrator to keep such share or shares, and work the same, together with the estate remaining undivided, for a term not exceeding ten years; but such order must not be granted, if in conflict with the will of the testator.

2213 (2605). **Distributee's share of proceeds; how paid or enforced.**—The executor or administrator must pay, at the end of each year, to the owner or owners of such share or shares a proportionate share of the profits arising from such estate, and is entitled to a credit for the same; but if it shall appear, on a settlement of his accounts, that he has not paid the same, a decree therefor in favor of such owner or owners must be rendered by the probate court.

2214 (2606). **Authority to administrator to hire laborers to cultivate plantation.**—The probate court has power to grant orders authorizing administrators, in cases of intestacy, to hire a sufficient number of laborers to keep up and cultivate the plantations of their intestates, where it is deemed by the court advisable to order the same to be kept together for a term of years.

2215 (2606). **Application for such order; notice and report.**—Before granting such order, the court must require the administrator to file a petition under oath, setting forth the facts upon which the application is based; and, upon the filing of such petition, the court must appoint a day for the hearing of the same, and must give ten days' notice thereof by advertisement in some newspaper published in the county; or if there is no newspaper published therein, then by posting the notice at the court-house door; and on the day appointed, the court must proceed to hear and determine the same upon the evidence adduced by the petitioner, or the other parties in interest, and any other evidence that the court may, in its discretion, cause to be adduced; and unless good cause be shown to the contrary, the court must grant such order, and must require the petitioner to return a written report of such hiring under oath, on or before a day specified in such order.

2216 (2607). **Real estate cultivated, but dower reserved.** When the estate of any decedent is kept together, the real estate may be cultivated under the direction of the executor or administrator; but the dower of the widow must in all cases be reserved.

2217 (2608). **Only kept together when not in conflict with will.**—The provisions of the preceding sections of this chapter must not be so construed as to conflict with the will of the testator.

2218 (2609, 2610). **Annual settlement of such estates.** The executor or administrator must make annual settlements of such estates, as required in other cases, and in such settlements he must show how such estate has been managed, crop made, expenses incurred, and the disposition of all moneys re-

ceived; and he must also show the amounts appropriated and expended for each and every person entitled to any distribution from such estate.

2219 (2611). **Filing accounts, etc.; notice and contest.** The account and vouchers, evidence and statement of the heirs and legatees must be filed, notice given, and contest made, in the same manner as on annual settlements in other cases.

2220 (2612). **Settlement compelled; account stated by the court.**—Such settlement may be compelled by attachment, or the probate court may proceed in the same manner as in other cases when an executor or administrator, being cited to make a settlement, fails to do so.

2221 (2613). **What rights not affected.**—The provisions of this chapter in relation to keeping estates together must not be so construed as to affect the rights of creditors, or to prevent any legatee or distributee from receiving his proportion of the estate on his arriving at full age.

CHAPTER 10.

INSOLVENT ESTATES.

2222 (2549). **Order of payment of debts.**—When the real and personal property of any decedent is insufficient for the payment of the debts, the proceeds arising from the sale thereof must be distributed as directed by section 2079 (2430), in proportion to the amounts due to each class of creditors, in the order in such section specified.

2223 (2550). **When and by whom estate reported insolvent.** Whenever the executor or administrator of any estate is satisfied that the property of the estate is insufficient to pay its debts, he must file with the judge of probate of the court having jurisdiction of the estate a report in writing, that such estate is, to the best of his knowledge and belief, insolvent.

Clark v. West, 5 Ala. 117; Steele v. Weaver, 20 Ala. 540; Heydenfeldt v. Towns, 27 Ala. 423; Hine v. Hussey, 45 Ala. 496.

2224 (2551). **Statements to be filed with report.**—He must file with such report,—

1. A statement of all the goods and chattels, evidences of debt, and other personal property, with the estimated value of each, and the amount of money belonging to such estate.

2. A full statement of the real property of the deceased, or any interest therein, and the local situation and estimated value thereof.

3. A full statement of the claims against the estate which have come to his knowledge, the character and amount of each claim, and the name and residence of each creditor, if known.

Raines v. Raines, 30 Ala. 425; Feagan v. Kendall, 43 Ala. 628.

2225 (2552). **Report and statement to be verified by affidavit.**—Such report and statement must be accompanied by an affidavit of the executor or administrator to the effect that they

are correct, to the best of his knowledge, information and belief.

Raines v. Raines, 30 Ala. 425; Feagan v. Kendall, 43 Ala. 628.

2226 (2553). **Day fixed for hearing; notice, how given.** The probate court, on the filing of such report and statements, must appoint a day, not less than thirty, nor more than sixty days therefrom, to hear and determine the same; and must give notice to the creditors of the estate of the filing of the report, and the day appointed to hear and determine the same, by publication, once a week for three successive weeks, in some newspaper published in the county, or if none is published therein, in the newspaper published nearest to the court-house of such county, and by posting such notice at the court-house door for the same length of time, and by forwarding such notices by mail to all creditors whose places of residence are known.

2227 (2554). **Hearing of such report.**—Upon the day appointed, or on any other day to which the hearing is continued, the court must proceed to hear and determine such report.

2228 (2555, 2558). **Issue of insolvency; trial by jury.**—Any creditor, or other person interested in the estate, may make an issue as to the correctness of such report, by denying in writing that the estate is insolvent, which issue must be tried by a jury on the application of either party; but only one issue must be made, in which any number of the creditors may join at any time before the determination thereof.

2229 (2556, 2557). **When report dismissed; payment of costs.**—If such issue is decided against the executor or administrator, the report must be dismissed, and execution for the costs may issue against him and his sureties; but if it is decided in his favor, the costs must be paid by the contesting creditor, or out of the estate, as the court may direct.

Feagan v. Kendall, 43 Ala. 628.

2230 (2559, 2560). **When declared insolvent; settlement ordered; notice, how given.**—If no creditor contests the correctness of the report, or if the issue is decided against him, the court must declare the estate insolvent, and must make an order for the executor or administrator, on a day therein named, not less than thirty, nor more than sixty days therefrom, to appear and make a settlement of his administration; and of such order, and of the day appointed for such settlement, notice must be given by the judge of probate as is required by section 2226 (2553).

Proceedings in rem.—Hine v. Hussey, 45 Ala. 496. **Jurisdiction attaches on filing report.**—Hine v. Hussey, 45 Ala. 496; Hayes v. Collier, 47 Ala. 726. **Effect of decree of insolvency** is to transfer to the probate court exclusive jurisdiction of all claims against the estate.—Edwards v Gibbs, 11 Ala. 292; Shiver v. Rousseau, 68 Ala. 564; Sharp v. Herrin, 32 Ala. 502; Ray v. Thompson, 43 Ala. 434; McEachin v. Reid, 40 Ala. 410; Thames v. Herbert, 61 Ala. 340 **It merely ascertains the status of the estate,** as between the personal representative and creditors of the estate; not affecting the rights of legatees or next of kin.—Randle v. Carter, 62 Ala. 95; McGuire v. Shelby, 20 Ala. 456; Thames v Herbert, 61 Ala. 340. **Effect on suits pending or subsequently brought.**—Cobbert v. Chandler, Minor, 254; Hale v. Cummings, 3 Ala. 398; Edwards v. Gibbs, 11 Ala. 292; McGehee v. Lomax, 49 Ala. 131; Walker v. Mock, 39 Ala. 568; Cunningham v. Lindsay, 77 Ala. 510; Cogburn v. McQueen, 46 Ala. 551. **What liens destroyed by decree of insolvency.**—Fitzpatrick v. Edgar, 5 Ala. 503; Burk v. Jones, 13 Ala. 167; Lamar v. Gunter, 39 Ala. 324; McEachin v. Reid, 40 Ala. 410; Ray v. Thompson, 43 Ala. 434; Hale v. Cummings, 3 Ala. 398; Seals v. Holloway, 77 Ala. 344. **What liens not destroyed.** McKinney v. Benagh, 48 Ala. 358. **Conclusive on administrator.**—McDonald v.

McDonald, 50 Ala. 26. **Effect of insolvency on distributees.**—Eubanks v. Clark, 78 Ala. 73. **Decree does not ipso facto terminate authority of personal representative.** Clay v. Gurley, 62 Ala. 14.

2231 (2561). **Nomination of administrator by creditors.** On the day appointed for such settlement, or on any day to which the same is continued, the creditors, present or represented, may nominate to the court any fit person, an inhabitant of this state, as administrator of the property, rights and credits of such estate unadministered.

2232 (2562). **Manner of voting in making nomination.** In making the nomination, each creditor, in person or represented, votes as follows:

1. On claims held by any one creditor, not exceeding in the aggregate one thousand dollars, one vote for each hundred dollars.

2. On claims held by any one creditor, exceeding in the aggregate one thousand dollars, ten votes for the first thousand, and one for ever additional five hundred dollars.

3. Every creditor is entitled to one vote, and no creditor to more than twenty.

2233 (2563). **Mode of nominating and of proving claims.** The nomination must be made in the presence, and under the direction of the court; and the amount of claims held by any creditor may be proved by affidavit, or in any other mode satisfactory to the court.

2234 (2564). **Plurality of votes nominates.** — The person receiving a plurality of votes must be appointed by the court administrator of the property, rights and credits of the estate unadministered.

2235 (2566). **Appointment, when creditors fail to attend.** If none of the creditors attend at the time appointed, or if, from any other cause, no appointment of such administrator is made, the court may, in its discretion, continue the former executor or administrator, or may appoint any fit person, or the general administrator of the county, or should there be none, the sheriff or coroner of the county, to administer the estate according to the provisions of this chapter.

Clay v. Gurley, 62 Ala. 14.

2236 (2565). **Appointment to a vacancy.**—Whenever a vacancy occurs in the office of such administrator, the court, on motion of any creditor of the estate, may order another meeting of creditors, and hold another election, and make the appointment of the person elected, in all respects, as upon the first meeting of the creditors.

2237 (2567). **Appointment revokes former letters.**—Whenever an administrator is appointed under the provisions of this chapter, any former grant of letters on the estate is thereby revoked; and the property of such estate is thereby vested in such administrator.

2238 (2568). **When claims barred; affidavit to claims.** Every person, having any claim against the estate declared insolvent, must file the same in the office of the judge of probate, within nine months after such declaration, or after the same accrues, verified by the oath of the claimant, or some other person who knows the correctness of the claim, and that the same is

due, or it is forever barred; but when a claim is filed by an executor, administrator, guardian, or other trustee, it may be verified by his affidavit, that he believes the claim to be just, due and unpaid; and in all cases, the affidavits may be made, or any defect or insufficiency therein may be supplied by amendment or proof, at any time before a final decree.

What claims to be filed. Generally.—Thames v. Herbert, 61 Ala. 340; Gamble v. Dunklin, 48 Ala. 425; Ray v. Thompson, 43 Ala. 434; Murdock v. Rousseau, 32 Ala. 611; Hollinger v. Holly, 8 Ala 454. Judgments must be verified and filed. Campbell v. Campbell, 11 Ala. 730; Sharp v. Herrin, 32 Ala. 502. Judgments rendered before declaration of insolvency.—Whitfield v. Clark, 48 Ala. 555; Gamble v. Dunklin, Ib. 425 But not judgments rendered in suit pending at time of declaration of insolvency.—Gamble v. Dunklin, 48 Ala. 425. Whether demands in suit at time of declaration, quære.—McDougal v. Dawson, 30 Ala. 553. Such demands must be filed.—Murdock v. Rousseau, 32 Ala. 611. Contra.—Erwin v. McGuire, 44 Ala. 500; Waller v. Nelson, 48 Ala. 531; Dolberry v. Trice, 49 Ala. 207. The exception of claims on which suits are pending is the result of judicial decision, which, though in conflict with former decisions, perhaps ought not now to be disturbed.—Thames v. Herbert, 61 Ala. 340. Preferred, as well as other claims, must be filed.—Hatchett v. Curbow, 59 Ala. 516. But not claim for family expenses under will.—Prince v. Prince, 47 Ala. 283. Failure to file does not bar equity to enforce vendor's lien.—Flinn v. Barber, 61 Ala. 530. **By whom claim may be filed and prosecuted.** — Hogan v. Calvert, 21 Ala. 194; Henry v. Black, 24 Ala. 417; Blankenship v. Nimmo, 50 Ala. 506; Thornton v. Moore, 61 Ala. 347 (overruling Miller v. Parker, 47 Ala. 312). **Filing.** What a sufficient filing. Rutherford v. Br. Bank, 14 Ala. 92; Erwin v. McGuire, 44 Ala. 499; Levert v. Read, 54 Ala. 529 (overruling Clement v. Nelson, 46 Ala. 634, and Brewer v. Moseley, 49 Ala. 79); Shelton v. Poulson, 60 Ala. 578; Henderson v. Henderson, 67 Ala. 519. What not a sufficient filing.—Beene v. Phillips, 37 Ala. 312; Phillips v. Beene, 38 Ala. 248; Henderson v. Henderson, 67 Ala. 519. **Statement of claim; when sufficient.**—Flinn v. Shackelford, 42 Ala. 202; Woodruff v. Winston, 64 Ala. 412; Rowdon v. Young, 12 Ala. 234; Ransom v. Quarles, 16 Ala. 437; Hogan v. Calvert, 21 Ala. 194; Stubbs v. Beene, 37 Ala. 627; Thornton v. Moore, 61 Ala. 347. **Verification of claim.** When sufficient.—Trowbridge v. Pinckard, 31 Ala. 424; Cahart v. Clark, Ib. 396; P. & M. Bank v. Smith, 14 Ala. 416; Norvill v. Williams, 35 Ala. 551. When insufficient. — Beene v. Collenberger, 38 Ala. 647; Lay v. Clark, 31 Ala. 409; Dennis v. Coker, 34 Ala. 611; Cook v. Davis, 14 Ala. 416; Pickle v. Ezzell, 27 Ala. 623. **Amendment of affidavit.**—P. & M. Bank v. Smith, 14 Ala. 416; Dennis v. Coker, 34 Ala. 611; Fox v. Lawson, 44 Ala. 319; Prestridge v. Irwin, 46 Ala. 653; Thornton v. Moore, 61 Ala. 347. **Effect of failure to file.**—Murdock v. Rousseau, 32 Ala. 611; Thames v. Herbert, 61 Ala. 340. Failure of creditors to file their claims does not annul decree of insolvency.—McCuan v. Turrentine, 48 Ala. 68. If a surplus is left after paying claims which have been filed, distributees entitled in preference to creditors who did not file their claims. Puryear v. Puryear, 34 Ala. 555. But see Phelan v. Phelan, 13 Ala. 679, and Middleton v. Maul, 16 Ala. 479. Representative not authorized to pay claim which has not been filed.—Sharp v. Sharp, 35 Ala. 574. Claim not filed within the time required by the statute not available as an off-set in suit by personal representative. Bell v. Andrews, 34 Ala. 538; Shelton v. St. Clair, 64 Ala. 565. **Filing claim operates a presentation.**—Lattimore v. Williams, 8 Ala. 428. **Effect of taking claim from file.**—Ross v. Ross, 21 Ala. 105.

2239 (2569). **Longer time allowed infants and lunatics.** The provisions of the preceding section, as to the time within which claims are to be filed, do not apply to infants and persons of unsound mind, who are allowed nine months after the removal of their respective disabilities.

2240 (2570). **Verification of claims in another state.** When a claim against such estate is verified by the oath of a person out of this state, but within the United States, such oath may be made before a notary public, justice of the peace, or any judge of a court of record, or a commissioner of this state; and when made before a justice of the peace it must be certified that such officer was a justice of the peace, and that his attestation is genuine, by some judge of a court of record, or a commissioner of this state; but when made before either of the

other officers specified, no other proof of the taking of such oath is necessary than the certificate of such officer.

Carhart v. Clark, 31 Ala. 396; Fox v. Lawson, 44 Ala. 319.

2241 (2571). **Verification of claim in foreign country.** When such oath is taken out of the United States, it may be taken before any judge of a court of record, mayor or chief magistrate of any county, city, borough, or town, notary public, or diplomatic, consular, or commercial agent of the United States; and no other proof of the taking of such oath is necessary than the certificate of such officer.

2242 (2572). **Receipt for claim; indorsement of filing.** The judge of probate must, when required, give a receipt for such claim to the claimant, his agent, or attorney, and must indorse on the claim the day when the same was filed, and sign his name thereto.

2243 (2573). **Docket of claims.**—Such judge must keep a docket of all the claims thus filed, which must be at all times, during office hours, subject to the inspection of the administrator and creditors of, or any person interested in the estate.

2244 (2574). **When claim allowed without further proof.** If no opposition is made, in the manner hereinafter provided, within twelve months after the time when the estate was declared insolvent, such claim must be allowed against the estate without further proof.

See citations to succeeding section.

As amended, Dec. 4, 1879, p. 69.

2445 (2575). **Objections to claims; issue, trial, costs.**—At any time within twelve months after the declaration of insolvency, the administrator, or any creditor, heir, legatee, devisee, or distributee may object to the allowance of any claim filed against the estate, by filing objections thereto in writing; and thereupon the court must cause an issue to be made up between the claimant and the objector, in which issue the correctness of such claim must be tried as in an action of law, if required; and if it is found for the claimant to the whole amount thereof, the same must be allowed, and such claimant recover the costs of the trial of such issue; but if against the claimant, the claim must be rejected, and the party contesting recovers the costs of the trial of such issue.

Allowance of claims, unless objections filed within time allowed, a matter of right.—McNeil v. Macon, 20 Ala. 772; Hardy v. Meachen, 33 Ala. 457; Thames v. Herbert, 61 Ala 340; Thornton v. Moore, Ib. 347; Guard v. Hale, 64 Ala. 479; Clark v. Knox, 70 Ala. 607. **But matters subsequently occurring** may be raised at any time before decree allowing claim.—Thames v. Herbert, 61 Ala. 340; Thornton v. Moore, Ib 347. **An objection as to time of filing** may be made at any time before, or on settlement.—Cahart v Clark, 31 Ala. 396; Bartol v. Calvert, 21 Ala. 42. **But as to verification or correctness,** must be filed within time allowed. Gaffney v. Williamson, 21 Ala. 112; Hogan v. Calvert, 21 Ala. 194; Hardy v. Meachen, 33 Ala. 457; Moore v. Winston, 66 Ala 296; and authorities first supra. **When motion to strike plea from file properly sustained.**—Thornton v. Moore, 61 Ala. 347. **Trial by jury.**—Blankenship v Nimmo, 50 Ala 508; Noce v. Garner, 70 Ala. 443. **Plea of statute of limitations of three years** must aver claim an open account.—Clark v. Guard, 73 Ala 456. **Bar must be complete when claim is filed.** Woodruff v. Winston, 68 Ala. 412. **Allowance of claim has force of judgment in personam.**—Randle v. Carter, 62 Ala. 95. **Effect of judgment rejecting claim.** Saltmarsh v. Bird, 19 Ala 665; McDougald v. Rutherford, 30 Ala 253; McDougald v. Dawson, Ib 553; Coffin v. McCullough, 30 Ala. 107. **Proper mode of declaring on claim.**—Ross v. Ross, 20 Ala. 105. **Burden of proof on contest.** Woodruff v. Winston, 68 Ala. 412. **What necessary to equitable relief against allowance,** when no objection has been filed.—Moore v. Winston, 66 Ala. 296.

2246 (2576). **If part only found due, it must be allowed; costs.**—If a part only of such claim is found to be due, it must be allowed for that amount, and the costs paid by either party, or in such proportion by either party as the court may direct.

2247 (2577). **When settlement to be made.**—Every executor or administrator of an insolvent estate must make a settlement of his accounts as such, at such time as the court may appoint, not less than nine, nor more than fifteen months from the time the estate is declared insolvent.

Watt v. Watt, 37 Ala. 543; Baker v. Wood, 51 Ala. 345; Baldwin v. Deming, Ib. 553; Clark v. Guard, 73 Ala. 456.

2248 (2578). **On such settlement, debts paid ratably; other settlements.**—At such settlement, the court must decree to each creditor whose claim has been allowed, as herein provided, his proportion of all moneys then found due from such executor or administrator, reserving in his hands a ratable proportion of such moneys for such claims as may be then contested and undivided; and a similar settlement and distribution must be made at least every six months thereafter, at such times as the court may appoint, until the estate is finally settled and distributed.

Clark v. Guard, 73 Ala. 456.

2249 (2579). **Effect of report of insolvency on pending suits.**—During the progress of any suit against an executor or administrator, he may show that such estate has been reported insolvent, and upon such showing the cause must be continued until the final disposition of such report.

Cunningham v. Lindsay, 77 Ala. 510. See, also, citations to section 2238.

2250 (2580). **Plea of declaration of insolvency; proceedings thereon.**—The executor or administrator may also, at any time before judgment, plead specially that the estate has been declared insolvent; and, in such case, the other issues must be tried, and judgment rendered thereon.

Lunsford v. Baskins, 6 Ala. 512; Shiver v. Rousseau, 68 Ala. 564; Dolberry v. Nice, 49 Ala. 207.

2251 (2581). **Judgment certified to probate court; execution for costs.**—If such judgment is for the plaintiff, and it is shown to the court that such estate has been declared insolvent, an order must be made to the effect that no execution issue on such judgment, but that the same be certified to the proper probate court; and upon a certified copy of such judgment being filed as a claim against the estate, it must be allowed with the costs against such estate, unless shown to have been obtained by collusion; and when such judgment is certified, the clerk may demand of the plaintiff payment of all costs incurred in obtaining the same, and if the plaintiff fails for twenty days after the judgment is so certified to pay such costs, execution may issue against him for the same as in other cases.

See citations to section 2238.

2252 (2582). **Effect of appeal on contest of report.**—If an appeal has been taken on a contest as to the report of insolvency, the case must, on motion, be continued during the pendency of such appeal.

2253 (2583). **Claims not due may be presented; dividends on.**—Any creditor whose debt is not due may file the same as if due, and thereupon must be considered as a creditor under this chapter; and he is entitled to his dividend, or such an amount as, with the interest added from the time of payment to the maturity of the debt, would be equal to the amount thereof.

2254 (2584). **Claims allowed after partial distribution entitled to full dividend.** — Any creditor of an insolvent estate, whose claim is allowed after a partial distribution, must be allowed out of the remaining assets of such estate, if sufficient, such an amount as will give him his just dividend.

2255 (2585). **When creditor may sue those receiving dividends for his proportion.**—Any creditor of an insolvent estate, whose claim is not barred, may sue any person who has received any dividend of such estate, and may recover from him such an amount of the dividend he has received as shall be in the same proportion thereto as the claim of the plaintiff bears to the debts of the estate distributed, including the claim of the plaintiff.

Shelton v. Carpenter, 60 Ala. 201; Clark v. Guard, 73 Ala. 456.

2256 (2586). **Payment to another creditor reduces recovery.**—But in such action the defendant may reduce the recovery, by showing that such dividend has been reduced by the recovery or payment of the claims of other creditors of such estate in the like proportion.

2257 (2587). **Costs in such cases.**—In such action, the plaintiff must pay the costs, unless he proves that he has exhibited his claim and demanded of the defendant his proportion of the dividend received by him, before the commencement of the action.

Feb. 13, 1879, p. 164, sec. 1.

2258. Sale of lands after declaration of insolvency.—On the application of an executor or administrator of an estate which has been declared insolvent, for an order for the sale of lands belonging to the estate for the payment of debts, he shall be allowed to obtain such order without taking any evidence by deposition, as in chancery cases, to show the necessity of such sale.

Ib. sec. 2.

2259. Notice to heirs, etc., of such application.—Such application shall be in writing, verified by affidavit, shall contain an accurate description of the lands sought to be sold, and shall set forth the names and places of residence of the heirs or devisees, and whether they are under or over the age of twenty-one years; and the court shall give notice to such heirs or devisees of the filing of such application, and of the day appointed to hear the same, by publication once a week in some newspaper published in the county, or if none is published therein, in the newspaper published nearest to the court-house of such county, by posting notice at the court-house door for the same length of time, and by forwarding notices to those whose places of residence are known.

2260 (2588). **Representative may maintain action for recovery of lands.**—The administrator of an insolvent estate may maintain an action for the recovery of lands of the estate, in every case in which such action might be maintained by him if the estate was solvent.

Langford v. Dunklin, 71 Ala. 605.

2261 (2589). **Second declaration by succeeding administrator not necessary.**—An estate of a decedent having once been declared insolvent, it shall not be necessary for any succeeding administrator to apply for, or obtain a declaration or decree of insolvency; but a declaration of insolvency once had, and remaining unreversed, shall continue, and apply to, and be effectual under all subsequent administrations, as if obtained under each of them.

CHAPTER 11.

SUITS BY AND AGAINST EXECUTORS AND ADMINISTRATORS, AND ENFORCEMENT OF JUDGMENTS AND DECREES; ADMINISTRATORS AD LITEM; AUTHORITY OF FOREIGN EXECUTORS AND ADMINISTRATORS TO SUE FOR, AND RECOVER OR RECEIVE PROPERTY.

2262 (2615). **In what county representatives may be sued.** Executors or administrators are liable to be sued, in their representative character, in all cases, in the county in which letters were granted; and service of summons may be made on them in any county in the state.

2263 (2614). **Not to be sued for six months, etc.**—No suit must be commenced against an executor or administrator, as such, until six months, and no judgment rendered against him, as such, until eighteen months after the grant of letters testamentary or of administration.

Moore v. Stainton, 22 Ala. 831; Espey v. Comer, 76 Ala. 501.

2264 (2621). **Suits begun by special administrator, continued by successor.**—Suits commenced by a special administrator do not abate by the appointment of an executor or administrator in chief, but may be prosecuted by such executor or administrator.

2265 (2622). **Suits begun by or against representative, prosecuted by or against successor.**—When any action has been commenced by or against the personal representative of a decedent, the same may be prosecuted by or against any succeeding executor or administrator, who may, on motion, be made a party.

Russell v. Erwin, 41 Ala. 292; Brown v. Tutwiler, 61 Ala. 372; Wells v. Elliott, 68 Ala. 183.

2266 (2624). **On death of one representative, suit continued against survivor.**—If any one of two or more executors or administrators, against whom a suit is pending, die during the pendency of the suit, it does not abate, but may be continued against the survivor or survivors, on a suggestion of such death on the record.

2267 (2632). **Damages to realty survive to representatives.** All proceedings to ascertain damages done to real property survive to the executors or administrators.

2268 (2631). **Representatives of those who were liable to an estate also liable.**—The executor or administrator of any

decedent who, as executor or administrator, or otherwise, has wasted or converted to his own use any assets of any other decedent, is liable in the same manner as his testator or intestate would have been, if living.

2269 (2616). **Limit of representative's liability.**—No executor or administrator is liable, except in the case provided by section 2077 (2428), beyond the amount of assets which have come to his hands, or which have been lost, destroyed, wasted, injured, depreciated, or not collected, by want of diligence on his part, or an abuse of his trust.

2270 (2617). **When resignation no defense.**—No executor or administrator can allege his resignation in defense to any action or proceeding, without an averment that he has settled his administration, and delivered over the assets of the estate, as required by law.

Skinner v. Frierson, 8 Ala. 915; Gayle v. Elliott, 10 Ala. 264; Cogburn v. McQueen, 46 Ala. 551; Shiver v. Rousseau, 68 Ala. 564.

2271 (2636). **Executor de son tort only liable to representative; exception.**—No person is liable to an action, as executor of his own wrong, for having taken, received, or interfered with the property of a deceased person, but is liable to the executor or administrator for the value of all the property so taken or received, and for all damages caused by his act to the estate of the deceased; but the provisions of this section must not be construed so as to prevent any creditor from maintaining a suit against any one in possession of property fraudulently transferred by such deceased person.

Wood v. Bevill, 10 Ala. 197; Carpenter v. Going, 20 Ala. 587; Watts v. Gayle, Ib. 817; Simonton v. McLane, 25 Ala. 353; Abernathy v. Bankhead, 71 Ala. 193.

2272 (2403). **Suit on bond of representative.**—Any bond given by an executor or administrator, as such, may be sued or proceeded on in the name of the party aggrieved, until the whole penalty is exhausted.

Amason v. Nash, 24 Ala. 279.

2273 (2404). **Bond irregularly taken a statutory bond.** The bond of the general administrator of the county, or of any executor or administrator, is valid and operative as a statutory bond, and is of the same obligation, force and effect as a statutory bond, though it may not be approved, or in the penalty, or payable, or with the condition required by law.

Steele v. Tutwiler, 68 Ala. 107.

2274. Conditional execution or delivery of bond.—A surety on the bond of the general administrator of the county, or on the bond of any executor or administrator, cannot avoid liability thereon, on the ground that he signed or delivered it on condition that it should not be delivered to the judge of probate, or should not become perfect, unless it was executed by some other person who does not execute it.

2275 (2634). **When legatee may sue at law for legacy.**—Any legatee, after eighteen months from the grant of letters testamentary, or of administration with the will annexed, may sue at law and recover his legacy, upon proof that the executor assented to the same.

Cox v. McKinney, 32 Ala. 461; Bonner v. Young, 68 Ala. 35; Pettigrew v. Pettigrew, 1 Stew. 580; Gause v. Hughes, 9 Port. 552.

2276 (2618). **How judgments and decrees of probate court enforced against representative.**—All judgments, orders and decrees of the probate court against an executor or administrator, for the payment of money, may be enforced by execution, or by process of garnishment, which may issue in like cases and manner as it may issue on judgments in courts of law, and may, in like manner, be prosecuted to judgment against the garnishee; for the delivery of personal property, by attachment, or a special order to the sheriff, requiring him to take such property and deliver the same according to the judgment, order, or decree; for the possession of land, by a writ to the sheriff against the executor or administrator, requiring him to put the heir or devisee in possession of the same.

2277 (2619). **When sureties liable to execution or garnishment.**—When an execution against an executor or administrator, issued from the probate court on any judgment, order, or decree for money, is returned to any regular term of such court "no property" by the sheriff of the county, such judgment, order, or decree may be enforced against the executor or administrator and his sureties, by execution, or by process of garnishment, which may issue in like cases and manner as it may issue on judgments in courts of law, and may, in like manner, be prosecuted to judgment against the garnishee.

Little v. Heard, 16 Ala. 358; Jenkins v. Gray, Ib. 100; Thompson v. Bondurant, 15 Ala. 346; Poacher v. Weisinger, 20 Ala. 102; Hanna v. Price, 23 Ala. 826; Kirby v. Anders, 26 Ala. 466; Jewett v. Hoagland, 30 Ala. 716; Hudson v. Modawell, 64 Ala. 481; Payne v. Thompson, 48 Ala. 535; Stallworth v. Farnham, 64 Ala. 259; Steele v. Graves, 68 Ala. 17; s. c., Ib. 21; Steele v. Graves, Ib. 107; Martin v. Tally, 72 Ala. 23.

2278 (2620). **When execution issues de bonis propriis.** When any judgment is rendered in the circuit court against any executor or administrator, as such, and an execution thereon has been returned "no property" by the sheriff or other officer of the county in which such judgment was rendered, an execution may issue against the executor or administrator personally, to be levied on his goods and chattels, lands and tenements.

McGehee v. Lomax, 49 Ala. 131.

2279 (2623). **Executions in favor of successor.**—Any subsequent administrator, or administrator with the will annexed, may have execution on any judgment recovered by any person who preceded him in the administration of the same estate, without reviving the same, or without proceeding to notify the defendant in such judgment.

2280 (2633). **How judgments against decedents enforced against representatives.**—When a judgment has been rendered against a decedent before his death, no execution can issue thereon against his personal representative, except in the case provided for in section 2897 (3213); nor can the judgment be revived against him except by suit on the judgment.

Hurst v. Williamson, 42 Ala. 296; Brown v. Newman, 66 Ala. 275; May v. Parham, 68 Ala. 253.

2281. Representative may purchase under decree or execution for estate.—The executor or administrator of any decedent may purchase for the estate property sold under any decree of the chancery court, or under any execution, in his favor as such executor or administrator. March 1, 1881, p. 63.

2282 (2635). **How inventory, when read in evidence, explained by proof.**—In an action against an executor or administrator, in which the fact of his having administered the estate of his testator or intestate, or any part thereof, comes in issue, and the inventory of the property of the deceased, filed by him, is given in evidence, the effect of the same may be repelled by evidence,—

1. That any property has been omitted in such inventory, or was not returned therein at its full value, or since the filing thereof has increased in value.

2. That such property has perished, or been lost without the fault of such executor or administrator, or that it has been fairly sold, according to law, at a less price than the value so returned, or that, since the return of the inventory, such property has deteriorated or decreased in value; and in such action the defendant cannot be charged for any thing in action specified in the inventory, unless it appears that it was, or might have been collected by the exercise of due diligence.

2283 (2625). **When administrator ad litem appointed.** When, in any proceeding in the probate or chancery court, or other court having chancery jurisdiction, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein; and when such proceedings are pending in the chancery court, or court having like jurisdiction, the register, or the officer discharging the duties of register, of such court shall have authority to make such appointment in vacation.

Hays v. Cockrell, 41 Ala. 75; Teague v. Corbitt 57 Ala. 529; Ex parte Lyon, 60 Ala. 650; Dooley v. Villalonga, 61 Ala. 130; Malone v. Hill, 68 Ala. 225; Clark v. Knox, 70 Ala. 607; Gayle v. Johnston, 72 Ala. 254.

2284 (2626). **Decree in favor of administrator ad litem.** When, in such proceedings, the estate represented by the administrator ad litem is entitled to a decree for the recovery of money, or for the possession of real or personal property, such decree shall be rendered in favor of the administrator ad litem for the use of the estate.

2285 (2626). **Execution on money decree, how issued; money paid into court.**—When such decree is for the recovery of money, and the estate has no executor or administrator, execution shall issue thereon in favor of the administrator ad litem for the use of the estate, and the money, when collected, shall be paid by the officer to the judge of the probate court, or to the register, or officer acting as register, of the chancery or other court having like jurisdiction, from which the execution issued; and the party against whom such decree is rendered may pay the same to such judge, register, or officer acting as register, before the issue of execution, whose receipt to him therefor shall be a full discharge of such decree.

2286 (2627). **When writ issues under decree for recovery of property.**—When such decree is for the recovery of real or personal property, and the estate has no executor or administra-

tor, no writ of possession, or other writ for the enforcement of such decree, shall issue thereon, until there shall be some person duly authorized under the laws of this state to receive the possession of such property, and then such writ shall issue in favor of such person.

2287 (2628). **Decree when executor or administrator adversely interested; how enforced.**—When such administrator ad litem is appointed on account of the adverse interest of the executor or administrator, and the decree is rendered against such executor or administrator, no execution, writ of possession, or other writ for the enforcement of the decree, shall issue thereon, but in such decree the court shall require the executor or administrator to charge himself, as executor or administrator of the estate represented by the administrator ad litem, with the money or property recovered of him by the administrator ad litem; but when the decree is not against the executor or administrator, execution, writ of possession, or other writ for the enforcement of the decree, shall issue thereon in favor of such executor or administrator.

2288 (2629). **Duty and compensation of judge of probate or register; penalty.**—It shall be the duty of the judge of probate, register, or officer acting as register, receiving the money, to pay over the same, less one-half of one per cent. thereon, to the person entitled thereto, on demand; and for failure to do so, he incurs a penalty in favor of such person of ten per cent. thereon, which, together with the money received and interest thereon, may be recovered by suit on his bond.

2289 (2630). **Compensation of administrator ad litem; how paid.**—Such administrator ad litem must be allowed for his services such compensation as the judge of probate or chancellor appointing him may direct, to be taxed and collected, as part of the costs of the proceedings, either out of the estate represented by him, or out of the general fund administered therein, or out of any party to the cause who may be taxed therewith, as the court may direct.

Clark v. Knox, 70 Ala. 607.

2290 (2637). **When foreign representative may sue for and recover, or receive property.**—Any executor or administrator who has obtained letters testamentary or of administration on the estate of a person who was not, at the time of his death, an inhabitant of this state, in any other of the United States, may maintain suits and recover or receive property in this state,—

1. By recording, at any time before judgment, or the receipt of the property, a copy of his letters, duly authenticated according to the laws of the United States, in the office of the judge of probate of the county in which such suit is brought or property received.

2. By giving bond, with at least two good and sufficient sureties, payable to and approved by such judge of probate, in such amount as he may prescribe, to be determined with reference to the value of the property to be recovered or received, and conditioned to faithfully administer such recovery or property according to law.

Broughton v. Bradley, 34 Ala. 694; Sloan v. Frothingham, 65 Ala. 593; s. c., 72

Ala. 589; Hatchett v. Berney, 65 Ala. 39; Ferguson v. Morris, 67 Ala. 390; Grimball v. Patton, 70 Ala. 627; Harris v. Moore, 72 Ala. 515.

2291 (2637). **Suit by foreign representative not affected by appointment of resident representative; right to intervene.** No suit brought by such foreign executor or administrator, under the provisions of the preceding section, must be abated, barred, or affected by the grant of letters of administration in this state, either prior or subsequent to the institution of such suit; but, in such case, the administrator appointed in this state may, if necessary for the protection of creditors, distributees, or legatees, resident in this state, intervene in such suit, and shall be entitled to the recovery therein.

2292 (2638). **Compliance with such requirements must be proved.**—Before a judgment is rendered in a suit brought by such foreign executor or administrator, the plaintiff must prove that he has complied in all respects with the provisions of section 2290 (2637), and failing to do so, he cannot recover.

Harris v. Moore, 72 Ala. 507.

2293 (2639). **Amount of bond, how determined; security thereby afforded.**—The judge of probate, in determining the amount of the bond which such executor or administrator should give, may examine him on oath; and such bond, when given, stands as security, on its condition being broken, for any person thereby injured.

2294 (2640). **Delivery of property or recovery of judgment protects defendant.**—A delivery of property or the recovery of judgment, under the provisions of section 2290 (2637), is a protection to the defendant, or to the person delivering the property, to the extent of such judgment, or the value of such property.*

CHAPTER 12.

SALE AND PARTITION OF PARTNERSHIP LANDS IN WHICH A DECEDENT HAD AN INTEREST AS PARTNER.

Feb. 23, 1881, p. 135, sec. 1.

2295. Sale or partition of lands in which decedent had an interest as partner; jurisdiction declared.—Whenever a member of any partnership dies, leaving the business thereof unsettled, whether such partnership had been dissolved or not at the time of his death, and there are lands, the property of the partnership, or of the partners as tenants in common, or in which the partnership, or the partners as tenants in common may have any interest growing out of the partnership business, the probate court having jurisdiction of the estate, in cases of intestacy, or where the will does not grant such power to any person, or does not prohibit the grant of such power to the executor or administrator, has jurisdiction to confer upon the executor or administrator of such decedent, on his application in writing, duly verified by oath, general authority to join the

* Sections 2641, 2642 and 2643 of Code of 1876 transposed to Part Third.

surviving partner, or partners, in privately selling and conveying any or all of such lands, or any interest therein, whenever it may be necessary or to the advantage of the estate to sell the same for the payment of the debts of the partnership; and also to agree with such surviving partner, or partners, as to the partition of all such lands, or such part thereof as may not be sold, and to execute and receive all such conveyances as may be necessary to perfect such partition.

2296. Contents of application.—Such application must describe the lands as to which such authority is sought, must state the interest of the deceased partner therein, the probable value of such interest, after the payment of the debts of the partnership, the names and places of residence of the heirs or devisees, and whether any, and, if so, which of them are under the age of twenty-one years, or are persons of unsound mind, or are married women. Ib. sec. 2.

2297. Day fixed for hearing; guardian ad litem; notice. Upon the filing of such application, the court must appoint a day, not less than forty days thereafter, for the hearing of the same, must appoint a proper person guardian ad litem to represent such of the heirs or devisees as are minors or of unsound mind, and must issue a citation to such of the heirs or devisees as are of full age and reside in this state, notifying them of the application and of the day appointed for its hearing, which must be served on them ten days before the hearing; and if any of them are married women, it must also be served on their husbands, if residents of, and in this state. Notice of the application, and of the day appointed for the hearing, must also be given by publication, once a week for three successive weeks, in some newspaper published in the county, or if none is published therein, then in the newspaper published nearest the court-house of such county; and if any of the heirs or devisees, or husbands of such of them as are married women, reside out of, or are then absent from the state, such publication shall be sufficient to bring them into court. Ib. sec. 3.

2298. Right to contest; duty of guardian ad litem.—Any person interested in the estate of such decedent may contest such application; and the guardian ad litem must deny in writing the allegations thereof, and, if necessary, must employ counsel to defend the interests of those he represents. Ib. sec. 4.

2299. Hearing and decree.—On the day appointed for the hearing, or on any other day to which it may be continued, the court must proceed to hear and determine the application; and if the allegations of the application are proved to its satisfaction by competent evidence, the court may grant an order conferring upon the executor or administrator the authority authorized by the provisions of this chapter. Ib. sec. 5.

2300. How testimony taken when minors or persons of unsound mind are interested.—If any of the heirs or devisees are minors or of unsound mind, such order must not be made, unless evidence has been taken as in chancery cases, showing that such application should be granted; and such evidence must be taken, whether the guardian ad litem denies the truth of the allegations of the application or not, and must be recorded; and any order granted without a compliance with the provisions of this section shall be wholly void. Ib. sec. 6.

Ib. sec. 7.

2301. When application dismissed; costs.—If, on the hearing of the application, the facts are not proved, it must be dismissed at the cost of the executor or administrator, for which execution may issue against him and his sureties.

Ib. sec. 8.

2302. Record of order when granted.—If such order is granted, it shall be the duty of the executor or administrator to have a certified copy thereof recorded, within three months thereafter, in the office of the judge of probate of each county in which any part of such lands may be situated.

Ib. sec. 9.

2303. Report of conveyances made; when conveyances confirmed, and when vacated.—The executor or administrator must, within sixty days after making or receiving any conveyance under the provisions of this chapter, report on oath his proceedings to the court, which must examine the same, and may also examine witnesses in relation thereto; and if, upon such examination, the court is satisfied that such proceedings were fairly conducted, and that the interests of the estate are not unduly prejudiced thereby, it must make an order confirming the same, and must indorse upon each conveyance so made by the executor or administrator, upon its presentation to the court, a certificate of such confirmation, and the date thereof, which shall be evidence of such confirmation, and must be recorded with the conveyance; but if the court is not so satisfied as to any such conveyance, it must vacate the same, and thereupon the authority granted to the executor or administrator shall continue in force.

Ib. sec. 10.

2304. Title vested by conveyance.—Any conveyance made by the executor or administrator, and confirmed by the probate court, under the provisions of this chapter, shall have the effect of vesting in the party to whom it is made all the right, title and interest that the deceased partner may have had in the lands conveyed at the time of his death.

Ib. sec 11.

2305. Lands subject to administration, and may be conveyed to heirs or devisees.—Any lands conveyed to the executor or administrator of a deceased partner, under the provisions of this chapter, shall be subject to administration in all respects as if the full legal title thereto had been vested in him at the time of his death; and the probate court shall have authority, upon proper application and due proof, to order the executor or administrator, or any other person it may appoint, to convey the same, or a proper interest therein, to the heirs or devisees of such decedent.

Ib. sec. 12.

2306. Authority may be continued in successor without application.—The authority conferred under the provisions of this chapter shall remain in the executor or administrator only so long as he continues as such; but the probate court may, without application therefor, make an order continuing such authority in his successor, if it shall consider him a suitable person to exercise the same.

TITLE V.

DOMESTIC RELATIONS.

CHAPTER 1.—Husband and wife.
2.—Relieving infants of disabilities of non-age.
3.—Legitimating and adopting children; custody of children on voluntary separation of parents.
4.—Guardian and ward.
5.—Protection of estates of intemperate persons.

CHAPTER 1.

HUSBAND AND WIFE.

ARTICLE 1.—Marriage.
2.—Divorce and alimony.
3.—Separate property of wife; rights and liabilities of husband and wife; insurance on husband's life.

ARTICLE I.

MARRIAGE.

2307 (2670). **Incestuous marriages forbidden.**—The son must not marry his mother or stepmother, or the sister of his father or mother, or the widow of his uncle. The brother must not marry his sister or half-sister, or the daughter of his brother or half-brother, or of his sister or half-sister. The father must not marry his daughter or granddaughter, or the widow of his son. No man shall marry the daughter of his wife, or the daughter of the son or daughter of his wife; and all such marriages are hereby declared incestuous.

2308 (2671). **Applies to illegitimate relatives.**—The provisions of the preceding section apply to illegitimate, as well as to legitimate children and other relations.

2309 (2672). **What minors incapable of marriage.**—A man under the age of seventeen, and a woman under the age of fourteen years are incapable of contracting marriage.

Marriage voidable merely.—Beggs v. State, 55 Ala. 108; Cooley v. State, Ib. 162.

2310 (2673). **When issue not illegitimate.**—The issue of any incestuous marriage, before the same is annulled, shall not be deemed illegitimate.

2311 (2674). **By whom solemnized.**—Marriages may be solemnized by any licensed minister of the gospel, in regular communion with the Christian church or society of which he is a member; by a judge of the supreme, circuit, or city court, or by a chancellor within this state; or by a judge of probate, or any justice of the peace within his county.

2312 (2675). **By pastor of any religious society.**—Also by the pastor of any religious society according to the rules or-

dained, or custom established by such society; and the clerk or keeper of the minutes of such society must keep a register, and enter therein a particular account of all marriages solemnized by the society; which register, or a sworn copy thereof, is presumptive evidence of the fact.

2313 (2676). **By Quakers, or other Christian society.**—The people called Mennonists, or Quakers, or any other Christian society, having similar rules or regulations, may solemnize marriage according to their forms by the consent of the parties, published and declared before the congregation assembled for public worship.

2314 (2677). **Not to be solemnized without license.**—No marriage shall be solemnized without a license, to be issued by the judge of probate of the county in which the woman resides; which license is an authority to any one qualified to solemnize marriage, to join together in matrimony the persons therein named.

Cotten v. Rutledge, 33 Ala. 110; Robertson v. State, 42 Ala. 57; Campbell v. Gullatt, 43 Ala. 57.

2315 (2678). **When consent of parents and bond required.** If the man intending to marry be under twenty-one, and the woman under eighteen years of age, and have not had a former wife or husband, the judge of probate must require the consent of the parents or guardians of such minors to the marriage, to be given either personally or in writing; and if the latter, the execution thereof must be proved. The judge of probate must also require a bond to be executed in the penal sum of two hundred dollars, payable to the State of Alabama, with condition to be void if there is no lawful cause why such marriage should not be celebrated.

Cotten v. Rutledge, 33 Ala. 110; Fitzsimmons v. Buckley, 59 Ala. 539.

2316 (2679). **Registry of licenses.**—The judge of probate must keep a book, in which is to be registered all licenses issued by him, and must state whether the parties, or either of them, were of the age specified in the preceding section. If not, he must also state whether either of them had been previously married, or if consent had been given to the marriage by the parent or guardian. If such consent was in writing, he must transcribe it on the same page on which he records the license; and the record so made, or a certified copy thereof, is presumptive evidence of the facts.

Beggs v. State, 55 Ala. 108.

2317 (2680). **Marriage certificate recorded with license.** All persons or religious societies, solemnizing marriage in virtue of a license, or according to their peculiar forms, must, within one month thereafter, certify the fact in writing to the judge of probate, setting forth the names of the parties, and the time and place of the celebration thereof; which certificate must be recorded in the book kept for the registry of licenses; and a certified copy thereof is presumptive evidence of the fact.

As amended, Feb. 5, 1883. p. 38.

2318 (2681). **Penalty for issuing license improperly.**—A judge of probate, issuing a license for the marriage of a minor contrary to the provisions of this article, forfeits two hundred dollars to the parent, or to the guardian of such minor for the use of his ward, for which the parent or guardian may sue.

Cotten v. Rutledge, 33 Ala. 110; Wood v. Farnell, 50 Ala. 546; Fitzsimmons v. Buckley, 59 Ala. 539; Roberts v. Pippen, 75 Ala. 103; Fulghum v. Roberts, Ib. 341.

2319. Penalty, when not recoverable.—If it be shown that the parent or guardian consented to the marriage, or that the judge of probate issuing the license was misled as to the age of such minor by his or her personal appearance, and that at the time of the issue of the license an affidavit was made before him by such minor, or by some other credible person claiming to know the fact, that such minor was of the age required by law, the penalty given by the preceding section is not recoverable. Ib. secs. 1, 2.

2320 (2682). **Penalty for marrying parties without license.** Any judge, minister of the gospel, or justice of the peace, who joins persons in marriage without a license, as required by this article, or who goes out of the state and marries persons, one or both of whom reside in this state, without such license, or a license from the state in which the marriage is celebrated, forfeits one thousand dollars, one-half to the use of the state, and the other half to the use of any person who may sue for the same.

2321 (2683). **Fees for marrying.**—Any judge, justice of the peace, or licensed minister of the gospel, celebrating the rites of matrimony, is entitled to two dollars.

ARTICLE II.

DIVORCE AND ALIMONY.

2322 (2685). **Divorce; by what court, and on what grounds granted.**—The court of chancery has power to divorce persons from the bonds of matrimony, upon bill filed in chancery by the aggrieved party, for the causes following:

1. In favor of either party, when the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state.
2. For adultery.
3. For voluntary abandonment from bed and board for two years next preceding the filing of the bill.
4. Imprisonment in the penitentiary of this or any other state, for two years, the sentence being for seven years or longer.
5. The commission of the crime against nature, whether with mankind or beast, either before or after marriage.
6. For becoming addicted after marriage to habitual drunkenness.

Subdivision 1. Order for examination of defendant's person by physicians is, after publication passed, a matter of discretion.—Anonymous, 35 Ala. 226. When evidence insufficient to establish.—Ib. **Subdivision 2.** Allegations of bill.—Holston v. Holston, 23 Ala. 777. When divorce properly granted.—Ib. Insanity excuses adultery.—Wray v. Wray, 19 Ala. 522; s. c., 33 Ala. 187; Mims v. Mims, Ib. 98. Proof of adultery.—Mosser v. Mosser 29 Ala. 313; Jeter v. Jeter, 36 Ala. 391. Adultery may be committed with slave.—Mosser v. Mosser, 29 Ala. 313. **Subdivision 3.** What constitutes abandonment of wife by husband.—Hanberry v. Hanberry, 29 Ala. 719. What will not excuse.—Ib. What does not constitute abandonment.—Crow v. Crow, 23 Ala. 583; Crossman v. Crossman, 33 Ala. 486. What equivalent to averment of abandonment.—Morris v. Morris, 20 Ala. 168. **When evidence outside of issue allowable.**—Ribet v. Ribet, 39 Ala. 348. **Effect of decree in favor of wife on rights of husband.**—Boykin v. Rain, 28 Ala. 332. **Jurisdiction not dependent upon place** where ground of divorce occurred.—Han-

berry v. Hanberry, 29 Ala. 719. **Bill not demurrable because it alleges two distinct grounds.**—Morris v. Morris, 20 Ala. 168. **What sufficient proof of marriage.**—Morris v. Morris, 20 Ala. 168; Weatherford v. Weatherford, Ib. 548. **Wife may acquire domicil separate from that of her husband.**—Hanberry v. Hanberry, 29 Ala. 719; Turner v. Turner, 44 Ala. 437. **Allowance to wife of solicitor's fees.**—Pearson v. Darrington, 32 Ala. 229; Jeter v. Jeter, 36 Ala. 391; Turner v. Turner, 44 Ala. 437.

2323 (2686). **To husband, when wife is pregnant at time of marriage.**—In favor of the husband, when the wife was pregnant at the time of marriage, without his knowledge or agency.

2324 (2687). **To wife in case of cruelty by husband.**—In favor of the wife, when the husband has committed actual violence on her person, attended with danger to life or health, or when from his conduct there is reasonable apprehension of such violence.

Reese v. Reese, 23 Ala. 785; David v. David, 27 Ala. 222; King v. King, 28 Ala. 315; Smedley v. Smedley, 30 Ala. 714; Goodrich v. Goodrich, 44 Ala. 670; Hughes v. Hughes, Ib. 698; Folmar v. Folmar, 69 Ala. 84.

2325 (2688). **Mode of proceeding in divorce suits.**—The proceedings must, in all respects, be conducted as other suits in chancery, except as herein otherwise directed. The cause for which the divorce is sought must be alleged in the bill, to which the other party must be made defendant; and if a non-resident, publication made as in other chancery suits. And in making his decree in the cause, the chancellor shall, as the evidence and the nature of the case may warrant, direct whether the party against whom the decree of divorce is made be permitted to marry again, and where, in decrees now or hereafter rendered, no order is made allowing or disallowing the divorced party to marry again, it shall be competent for the chancellor, upon petition and proper proof, to allow or disallow the petitioner to marry again, as justice may seem to require.

Prohibition against second marriage has no extra-territorial operation.—Fuller v. Fuller, 40 Ala. 301.

2326 (2689). **Answer; effect of.**—The defendant is not required to verify the answer by oath; and whether sworn to or not, it is not evidence in the cause, and can have no other effect than to put in issue the allegations of the bill.

Hughes v. Hughes, 44 Ala. 698.

2327 (2690). **Cases in which divorces are to be refused.** No decree can be rendered on the confession of the parties, or either of them; or if it appear that adultery was committed by either, with the consent of the other, for the purpose of obtaining a divorce; or where both parties have committed adultery; or where there has been a condonation of adultery by the admission of the offending party to conjugal embraces, after knowledge of the commission of the crime; or when the husband knew of, or connived at the adultery of the wife.

King v. King, 28 Ala. 315; Ribet v. Ribet, 39 Ala. 348; Goodrich v. Goodrich, 44 Ala. 670.

2328 (2691). **For abandonment, three years' residence to be proved.**—No bill can be filed for a divorce on the ground of voluntary abandonment, unless the party applying therefor, whether husband or wife, has bona fide been a resident of this

state for three years next before the filing of the bill, which must be alleged in the bill and proved.

Hendricks v. Hendricks, 72 Ala. 132.

2329 (2692). **In what court bill must be filed.**—Bills for divorce may be filed in the chancery district in which the defendant resides, or in the district in which the parties resided when the separation occurred; if the defendant is a non-resident, then in the district in which the other party to the marriage resides.

Reese v. Reese, 23 Ala. 785; Wiley v. Wiley, 27 Ala. 704; Edwards v. Edwards, 30 Ala. 394; Crossman v. Crossman, 33 Ala. 486; Turner v. Turner, 44 Ala. 437.

2330 (2693). **If defendant a non-resident, a year's residence by plaintiff must be proved.**—When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved.

Crossman v. Crossman, 33 Ala. 486.

2331 (2694). **Allowance to wife pending suit.**—Pending a suit for divorce, the court must make an allowance for the support of the wife out of the estate of the husband, suitable to his estate and the condition in life of the parties.

Ex parte King, 27 Ala. 387; Wray v. Wray, 33 Ala. 187; Ex parte Smith, 34 Ala. 456; Jeter v. Jeter, 36 Ala. 391; Turner v. Turner, 44 Ala. 437.

2332 (2695). **Allowance to wife on decree of divorce.**—If the wife has no separate estate, or if it be insufficient for her maintenance, the chancellor, upon granting a divorce, must decree the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family.

King v. King, 28 Ala. 315; Mims v. Mims, 33 Ala. 98; Jeter v. Jeter, 36 Ala. 391; Turner v. Turner, 44 Ala. 437; Smith v. Smith, 45 Ala. 264; Williams v. Hale, 71 Ala. 87.

2333 (2696). **Allowance when decree in favor of wife.**—If the divorce is in favor of the wife for the misconduct of the husband, the allowance must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.

2334 (2697). **Allowance, when against wife.**—If in favor of the husband for the misconduct of the wife, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife.

2335 (2698). **Divorce for adultery bars dower.**—A divorce for the adultery of the wife bars her of her dower, and of any distributive share in the personal estate of her husband.

Williams v. Hale, 71 Ala. 83.

2336 (2699). **Divorce for pregnancy bastardizes issue.** When a divorce is granted the husband for the pregnancy of the wife at the time of the marriage, the issue is thereby bastardized.

2337 (2700). **Effect of divorce on wife's separate estate.** A divorce deprives the husband of all control over the separate estate of his wife.

2338 (2701). **Custody of children on decree of divorce.** Upon granting a divorce, the court may give the custody and education of the children of the marriage to either father or

mother, as may seem right and proper, having regard to the moral character and prudence of the parents, the age and sex of the children; and pending the suit may make such orders in respect to the custody of the children as their safety and well-being may require. But in cases of abandonment of the husband by the wife, he shall have the custody of the children after they are seven years old, if he is a suitable person to have such charge.

Cornelius v. Cornelius, 31 Ala. 479; Bryan v. Bryan, 34 Ala. 516; Goodrich v. Goodrich, 44 Ala. 670; Anonymous, 55 Ala. 128.

2339 (2702). **Cases of divorce from bed and board.**—The chancellor may decree a divorce from bed and board for cruelty in either of the parties, or for any cause which would justify a decree from the bonds of matrimony, if the party applying therefor desires only a divorce from bed and board.

2340 (2703). **Proceedings in such cases.**—The proceedings in such cases are the same in all respects, and the court has the same power to make an allowance to the wife out of the estate of the husband, and provide for the custody and education of the children of the marriage, as provided in this article for divorces from the bonds of matrimony.

ARTICLE III.

SEPARATE PROPERTY OF WIFE; RIGHTS AND LIABILITIES OF HUSBAND AND WIFE; INSURANCE ON HUSBAND'S LIFE.

Feb. 28, 1887, p. 80, sec. 1.

2341. Separate property of wife.—All property of the wife, held by her previous to the marriage, or to which she may become entitled after the marriage, in any manner, is the separate property of the wife, and is not subject to the liabilities of the husband.

Ib. sec. 2.

2342. Earnings of wife.—The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for the husband, or to or for the family.

Ib. sec. 3.

2343. Damages for injuries to person or reputation. — All damages which the wife may be entitled to recover for injuries to her person or reputation, are her separate property.

Ib. sec. 4.

2344. Liability for ante-nuptial contracts and torts of wife.—The husband is not liable for the debts or engagements of the wife, contracted or entered into before marriage, or for torts committed by her before marriage; but therefor she remains liable and suable as if she were sole.

Ib. sec. 5.

2345. Liability for post-nuptial contracts and torts of wife.—The husband is not liable for the debts or engagements of the wife, contracted or entered into after marriage, or for her torts, in the commission of which he does not participate; but the wife is liable for such debts or engagements entered into with the consent of the husband in writing, or for her torts, and is suable therefor as if she were sole.

Ib. sec. 6.

2346. Wife's power to contract.—The wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of the husband expressed in writing.

Ib. sec. 7.

2347. How wife sues, and must be sued.—The wife must

sue alone, at law or in equity, upon all contracts made by or with her, or for the recovery of her separate property, or for injuries to such property, or for its rents, income, or profits, or for all injuries to her person or reputation; and upon all contracts made by her, or engagements into which she enters, and for all torts committed by her, she must be sued as if she were sole.

2348. Power of wife to alienate her real and personal property.—The wife, if the husband be of sound mind, and has not abandoned her, or be not a non-resident of the state, or be not imprisoned under a conviction for crime for a period exceeding two years, cannot alienate her lands, or any interest therein, without the assent and concurrence of the husband, the assent and concurrence of the husband to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land. But if the husband be non compos mentis, or has abandoned the wife, or is a non-resident of the state, or is imprisoned under a conviction for crime for a period exceeding two years, the wife may alienate her lands as if she were sole. But the personal property of the wife, or any part thereof, may be sold, exchanged, or otherwise conveyed or disposed of by the husband and wife, by parol, or otherwise. If the husband is living apart from the wife, without fault upon her part, or if he be of unsound mind, the wife may convey or dispose of such property in any manner as if she were sole. Ib. sec. 8.

2349. Contracts between husband and wife; she cannot become his surety. — The husband and wife may contract with each other, but all contracts into which they enter are subject to the rules of law as to contracts by and between persons standing in confidential relations; but the wife shall not, directly or indirectly, become the surety for the husband. Ib. sec. 9.

2350. Power of wife to engage in trade or business.—The wife may, with the consent of the husband, expressed in writing, and filed and recorded in the office of the judge of probate of the county of their residence, and of the county in which the business is carried on, enter into and pursue any lawful trade or business, as if she were sole. But the consent of the husband is not necessary, if he be of unsound mind, or has abandoned his wife, or is a non-resident of the state, or is imprisoned under conviction for crime. Ib. sec. 10.

2351. Property subject to provisions of this article.—All property of the wife, whether acquired by descent or inheritance, or gift, devise, or bequest, or by contract or conveyance, or by gift from a contract with the husband, is the separate property of the wife within the meaning, and is subject to all the provisions of this article, saving and excepting only such property as may be conveyed to an active trustee for her benefit. Ib. sec. 11.

2352 (2713). **Married women may make wills.**—Married women may, by last will and testament, dispose of their separate estates.

O'Donnell v. Rodiger, 76 Ala. 222.

2353 (2714). **Husband's distributive share of the wife's estate.**—If a married woman having a separate estate die intestate, leaving a husband living, he is entitled to one-half of the personalty of such separate estate absolutely, and to the use of

the realty during his life, unless he has been divested of all control over it by a decree of a court of chancery, as hereinafter provided.

Willis v. Cadenhead, 28 Ala. 472; Marshall v. Crow, 29 Ala. 278; Conoley v. Galey, 54 Ala. 269; Marshall v. Gayle, 58 Ala. 284; Gayle v. Randall, 71 Ala. 470; Jones v. Wilson, 60 Ala. 332.

2354 (2715). **Effect of separate estate on dower.**—If any woman having a separate estate survive her husband, and such separate estate, exclusive of the rents, income and profits, is equal to, or greater in value than her dower interest and distributive share in her husband's estate, estimating her dower interest in his lands at seven years' rent of the dower interest, she shall not be entitled to dower in, or distribution of her husband's estate.

Glenn v. Glenn, 41 Ala. 571; Dubose v. Dubose, 38 Ala. 238; Steadman v. Steadman, Ib. 473; Billingslea v. Glenn, 45 Ala. 540; Johnston v. Davenport, 42 Ala. 317; Barnes v. Carson, 59 Ala. 188; Wiggins v. Newberry, 72 Ala. 240; Harris v. Harris, 71 Ala. 536; Gordon v. Tweedy, 74 Ala. 232; Williams v. Williams, 68 Ala. 405.

2355 (2716). **Same.**—If her separate estate be less in value than her dower, as ascertained by the rule furnished by the preceding section, so much must be allowed her as, with her separate estate, would be equal to her dower and distributive share in her husband's estate, if she had no separate estate.

See citations to preceding section.

2356 (2733, 2734). **Insurance on life of husband.**—The wife, in her own name, or in the name of a trustee, may insure the life of the husband for the benefit of herself, or for the benefit of herself and any child or children of the marriage. Or the husband or father may insure his life for the benefit of his wife, or for the benefit of his wife and children, or for the benefit of his minor child or children, and such insurance is exempt from liability for his debts or engagements, or for his torts, or any penalty or damages recoverable of him, if the annual premiums thereon do not exceed five hundred dollars; or if such premiums exceed five hundred dollars, then to the extent of the insurance which an annual premium of five hundred dollars would purchase.*

Stone v. Knickerbocker Ins. Co., 52 Ala. 589; Continental Ins. Co. v. Webb, 54 Ala. 688; Fearn v. Ward, 65 Ala. 33; Felrath v. Schonfield, 76 Ala. 199.

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* The twelfth section of the act from which the first eleven sections of this article are taken, provides: "That sections 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, and 2732 of the Code of 1876 be, and the same are hereby repealed; and the provisions of sections 2713, 2714, 2715, and 2716 of said Code are applicable to the separate estate hereby defined and declared." The repealed sections noted above are contained in the Code, as reported to, and adopted by the general assembly, but as they are now repealed, the commissioner felt authorized to leave them out of the Code as printed, and insert the new system created by said act; but he has not left out or changed other provisions of the Code which are, no doubt, repealed by implication.

CHAPTER 2.

RELIEVING INFANTS OF DISABILITIES OF NON-AGE.

As amended, Feb. 13, 1879, p. 49.

2357 (2735). **When chancery may relieve from disabilities of non-age.**—The several chancery courts of the state, in term time, or the chancellors in vacation, are authorized to relieve minors over eighteen years of age from the disabilities of non-age, in the following cases, and none other:

1. Whenever the father of such minor, or the mother, if the father is dead, shall petition the court in writing, praying that such minor be relieved from the disabilities of non-age, and the court shall be satisfied that it is to the interest of such minor.

2. Whenever any such minor, having no father, mother, or guardian, shall petition the court to be relieved of the disabilities of non-age, and the court shall be satisfied that it is to the interest of such minor.

3. Whenever such minor, having no father or mother, but having a guardian, shall petition the chancery court to be relieved from the disabilities, and the guardian shall join in such petition, and the court shall be satisfied that it is to the interest of such minor.

2358 (2736). **Where petition filed.**—The petition must be filed in the district in which the parent or guardian of such minor resides, when the petition is filed by the parent or guardian; and in the district where the minor resides, when the petition is filed by a minor who has no parent or guardian, or whose parents reside beyond the limits of the state.

2359 (2737). **Notice given by register.**—Wherever the petition is filed by a parent who is the guardian of a minor, or by a minor and the guardian, it shall be the duty of the register to give notice of the filing of such petition in the newspaper published in the district having the largest circulation, and if no newspaper is published in such district, then in such manner as may be prescribed by the chancellor in vacation; and such notice shall be given once a week for three successive weeks before the time of hearing such petition.

2360 (2738). **Who may contest; evidence how taken.** Upon the hearing of all such petitions, any person may contest the granting of the same, upon giving security for costs of such contest. All evidence touching such petitions shall be taken in such manner as may be directed by the court, or the chancellor in vacation.

2361 (2739). **Decree and its effect.**—If, on the hearing of the evidence adduced, and upon such other evidence as may be required by the court, the court shall be satisfied that it will be to the interest of such minor to be relieved from the disabilities, the court shall thereupon decree accordingly, and such decree shall have the effect of investing such minor with the right to sue and be sued, contract and be contracted with, to buy, sell and convey real estate, and generally to do and perform all acts which such minor could lawfully do if twenty-one years of age, except as hereinafter provided.

2362 (2740). **Court may restrict rights of minor.**—The

court, in rendering its decree, may, if it deem it advisable, restrict and qualify the rights of minors relieved from the disabilities of non-age, as to acquittances to, and contracts with guardians, executors, administrators, trustees, and other persons indebted to such minors, to such an extent as to the court may seem proper in each particular case; and such restrictions shall be fully set forth in the decree relieving such minor from the disabilities of non-age.

2363 (2741). **Copy of decree filed with judge of probate for record.**—Every minor, relieved of the disabilities of non-age under the provisions of this chapter, must file a certified copy of the decree relieving him from such disabilities in the office of the judge of probate in each of the counties in which such minor shall thereafter reside, and in the office of the judge of probate of each county in the state where such minor shall do any business or make any contracts; and it shall be the duty of the judge of probate to record the decree and keep the same for the inspection of the public; and the decree shall not take effect in removing the disabilities of non-age in any case until the decree shall have been recorded in the office of the judge of probate, as provided in this section.

CHAPTER 3.

LEGITIMATING AND ADOPTING CHILDREN; CUSTODY OF CHILDREN ON VOLUNTARY SEPARATION OF PARENTS.

2364 (2742). **The marriage of the parents legitimates the children.**—The marriage of the mother and reputed father of a bastard child renders it legitimate, if recognized by the father as his child.

2365 (2743). **Proceedings to legitimate bastard children; effect of.**—The father of a bastard child may legitimate it, and render it capable of inheriting his estate, by making a declaration in writing, attested by two witnesses, setting forth the name of the child proposed to be legitimated, its sex, supposed age, and the name of the mother, and that he thereby recognizes it as his child, and capable of inheriting his estate, real and personal, as if born in wedlock; the declaration being acknowledged by the maker before the judge of probate of the county of his residence, or its execution proved by the attesting witnesses, filed in the office of the judge of probate, and recorded on the minutes of his court, has the effect to legitimate such child.

Lingen v. Lingen, 45 Ala. 410.

2366 (2744). **Child's name changed at same time.**—The father may, at the same time, change the name of such child, stating in his declaration the name it is then known by, and the name he wishes it afterwards to have.

2367 (2745). **Mode of adopting child; effect of.**—Any person desirous to adopt a child so as to make it capable of inher-

iting his estate, real and personal, or to change the name of one previously adopted, may make a declaration in writing, attested by two witnesses, setting forth the name, sex and age of the child he wishes to adopt, and the name he wishes it thereafter to be known by, which, being acknowledged by the declarant before the judge of probate of the county of his residence, filed and recorded as in the two preceding sections, has the effect to make such child capable of inheriting such estate of the declarant, and of changing its name to the one stated in the declaration; and, for services under this chapter, the judge of probate is entitled to a fee of one dollar.

2368 (2746). **Custody of children on voluntary separation.** In all cases of voluntary separation between man and wife, the court of chancery has power, on the petition of either party, twenty days' notice thereof being given to the other, to permit either the father or mother to have the custody and control of the children, and to superintend and direct their education, having regard to the prudence, ability and fitness of the parents, and the age and sex of the children.

Bryan v. Bryan, 34 Ala. 516; Anonymous, 55 Ala. 428.

2369 (2747). **Mode of proceeding; orders pending suit.** Upon the hearing of the petition, witnesses may be examined orally, or testimony may be taken as in other chancery cases. Whilst the application is pending, the court may direct an injunction to issue, or make any order that the safety and well-being of the wife or children may require.

CHAPTER 4.

GUARDIAN AND WARD.

ARTICLE 1.—Guardians of minors; appointment; bond.
2.—Guardians of persons of unsound mind; appointment; bond.
3.—Authority; duty of guardians, whether of minors, or of persons of unsound mind.
4.—Settlements of guardians.
5.—Compelling settlements of guardianship.
6.—Resignation and removal of guardians.
7.—Removal of person or property of ward.
8.—Judge of probate custodian of funds of minor, or of person of unsound mind.

ARTICLE I.

GUARDIANS OF MINORS; APPOINTMENT; BOND.

2370 (2748). **Guardians of minors; appointment.**—Guardians must be appointed for minors under the age of twenty-one years, by the court of probate of the county in which such minor resides.

Domicil of infant.—Carlisle v. Tuttle, 30 Ala. 613; Johnson v. Copeland, 35 Ala. 521; Daniel v. Hill, 52 Ala. 430; Metcalf v. Lowther, 56 Ala. 312; Desribes v. Wilmer, 69 Ala. 25. **What considerations should control court in making appoint-**

ment.—Lee v. Lee, 67 Ala. 406; Desribes v. Wilmer, 69 Ala. 23. **Appointment of non-resident not void.**—Martin v. Tally, 72 Ala. 23. **Effect of marriage of female guardian.**—Carlisle v. Tuttle, 30 Ala. 613; Martin v. Foster, 38 Ala. 688. **Validity of appointment cannot be collaterally assailed.**—Speight v. Knight, 11 Ala. 461. **When stranger preferred to father.**—Huie v. Nixon, 6 Port. 77. **When guardian estopped from denying validity** of appointment.—Harbin v. Bell, 54 Ala. 389. **One acting under void appointment a trustee in invitum.**—Corbitt v. Carroll, 50 Ala. 315. **Jurisdiction of chancery court not affected.**—Lee v. Lee, 55 Ala. 590.

2371 (2749). **Minor over fourteen may nominate guardian.** When the minor is over fourteen years of age, he may nominate a suitable person as his guardian in person, or such nomination may be certified by any justice of the peace to the court of probate.

Kelly v. Smith, 15 Ala. 687.

2372 (2750). **Father entitled to preference; guardian's control of ward.**—When a minor has a father living, and has an estate in his own right, a guardian must be appointed for him; and his father, if a suitable and proper person, and willing to give bond and qualify as guardian, is entitled to a preference. No such guardian can exercise any control over the person of his ward during the life of the father, or during the life of the mother, if the ward is a female, or a male under the age of fourteen years.

Striplin v. Ware, 36 Ala. 87.

2373 (2751). **Testamentary guardian.**—Guardians may be appointed by the last will and testament of the father, if the right is claimed within six months after the will is admitted to probate; but the mother is entitled to the custody of the person of the ward until it is fourteen years of age.

Dunham v. Hatcher, 31 Ala. 483; Desribes v. Wilmer, 69 Ala. 25.

2374 (2752). **Non-resident minors.**—The court of probate of the county in which the property, or a part of the property of a minor, not residing in the state, may be, has authority to appoint a guardian of the property within this state of such minor, but only one such appointment shall exist at the same time.

2375 (2756). **Selection of guardian.**—If there be two or more applicants for the guardianship of a minor, the judge of probate must prefer that person who is of nearest relationship, and will, in the opinion of the judge, best manage the estate of the ward.

2376 (2765). **General guardian of county.**—The judge of probate may appoint a general guardian for the county, who must be appointed and act as guardian when no other fit person applies for appointment and qualifies; the term of office of such general guardian continues during the term of the judge by whom he is appointed, unless he is re-appointed; and if re-appointed, his bond, if deemed sufficient, shall remain as a continuing security, or he may be required to execute a new bond.

2377 (2767). **Sheriff may be appointed guardian.**—If no fit person is appointed and qualifies as guardian of a minor, and there be no general guardian for the county, the sheriff must be appointed guardian, and the guardianship attaches to the office of sheriff.

Feb. 13, 1879, p. 165.

2378. Bond of guardian.—Before the issue of letters of guardianship, other than letters to the general guardian, or to the sher-

iff, the judge of probate must require the guardian appointed to enter into bond with sufficient sureties, payable to the judge of probate, in a penalty prescribed by him, which must be a sum not less than double the supposed or estimated value of the personal property, and double the rental value of the real estate of the ward for a term of three years, or, at the discretion of the judge, may be a sum equal to double the supposed or estimated value of the estate of the ward, real and personal, with condition for the faithful performance of all the duties which are, or may be required of him by law.

When good as statutory bond.—Brunson v. Brooks, 68 Ala. 248. **When not.** Alston v. Alston, 34 Ala. 15. **Signing of bond.**—Hall v. Hall, 43 Ala. 488. **When condition does not limit guardianship to person of infant.**—Alston v. Alston, 34 Ala. 15. **No action can be maintained while relation of guardian and ward exists.**—Eiland v. Chandler, 8 Ala. 781. **Reformation of bond in equity.**—Hall v. Hall, 43 Ala. 488. **Liability on bond.**—Moore v. Wallis, 18 Ala. 458; Williams v. Harrison, 19 Ala. 277; Alston v. Alston, 34 Ala. 15; Owens v. Grimsley, 44 Ala. 359; Tyson v. Sanderson, 45 Ala. 364; Corbitt v. Carroll, 50 Ala. 315; Anderson v. Thomas, 54 Ala. 104; Lee v. Lee, 67 Ala. 406; s. c., 55 Ala. 590. **When action at law cannot be maintained.**—Hailey v. Boyd, 64 Ala. 399.

2379 (2762). **Testamentary guardian may be relieved from giving bond.**—A father may by his last will relieve the guardian of his appointment for his minor child or children from giving bond and sureties for the faithful performance of his duties as guardian; but the authority of such guardian shall not extend to any other property or estate of such minor child or children, than such as is derived by gift, devise, descent, or distribution from the father, unless he give bond with sufficient sureties, as is required of other guardians.

2380 (2762). **Bond may be required of testamentary guardian.**—Before the issue of letters of guardianship to a testamentary guardian, relieved from giving bond and sureties, or at any time thereafter, if the judge of probate deems it necessary for the safety of such minor child or children, he may require of such guardian bond with sufficient sureties; or, on the application of such minor child or children, by next friend, and for good cause shown, may require of such guardian bond with sufficient sureties; in either case, if such guardian fails, for ten days after the requisition of such bond, to give the same, the judge of probate must withhold from him letters of guardianship, or if letters have issued, must remove him, and recall and revoke such letters.

2381 (2766). **Bond of general guardian.**—The general guardian of the county must give bond with at least two good and sufficient sureties, in a penalty to be prescribed by the judge of probate, and payable to him, with condition to faithfully perform all the duties which are, or may be required of him by law during the time he acts as such guardian.

2382 (2767). **Additional bond of sheriff as guardian.**—If the sheriff is appointed guardian of a minor, or of a person of unsound mind, and when the appointment is made, or at any time subsequent during the continuance of the guardianship, the judge of probate is of the opinion the official bond of such sheriff is not sufficient security for the protection of the ward, he may require of him an additional official bond, in such penalty as he may prescribe; and if such sheriff, for ten days after notice that such additional bond is required, fails to give the

same, he vacates his office, and the judge of probate must certify the vacancy to the appointing power.

Feb. 13, 1879, p. 165.

2383. Bond of guardian obtaining order to sell lands.—A guardian, other than the general guardian of the county, or the sheriff, or a testamentary guardian relieved from giving bond with sureties, who has not given bond in double the supposed or estimated value of the property or estate, real and personal, of the ward, must not, under any order or decree of the court of probate, make sale of the lands of the ward, until he has given bond with sufficient sureties, in a penalty equal to double the supposed or estimated value of such lands, payable to the judge of probate, and with condition that he will faithfully account for the proceeds of such sale.

2384 (2764). **New or additional bond may be required.**—The judge of probate has authority, and it is his duty, whenever he deems it necessary for the safety of the ward, to require the guardian to give a new or additional bond, and, if on notice of such requisition, such guardian fails for ten days to give such new or additional bond, to remove him and revoke his letters.

Hamner v. Mason, 24 Ala. 480; Lee v. Lee, 55 Ala. 604; s. c., 67 Ala. 417.

2385 (2764). **Sureties may require new or additional bond.** The surety or sureties of the guardian of a minor may, on application in writing to the judge of probate, verified by affidavit, expressing an unwillingness to remain longer bound, obtain an order from the judge, requiring such guardian to give a new or additional bond; and if, on notice of such requisition, such guardian fails for ten days to give such new or additional bond, he must be removed and his letters revoked.

2386 (2763). **Approval, filing and record of bonds.**—All bonds given by guardians of minors, or persons of unsound mind, must be approved by the judge of probate issuing the letters of guardianship, and must be filed and recorded in his office.

2387. Informal or irregular bond.—The bond of the general guardian of the county, or of the guardian of a minor, or of a person of unsound mind, is valid and operative as a statutory bond, and is of the same obligation, force and effect as a statutory bond, though it may not be approved, or in the penalty, or payable, or with the condition required by law.

2388. Conditional execution or delivery of bond.—A surety on the bond of the general guardian of the county, or on the bond of the guardian of a minor, or person of unsound mind, cannot avoid liability thereon, on the ground that he signed or delivered it on condition that it should not be delivered to the judge of probate, or should not become perfect, unless it was executed by some other person who does not execute it.

2389. Judge liable for neglect or omission in taking bond. The judge of probate, and the sureties on his official bond are liable to any person injured for any neglect or omission of the judge in not taking from a guardian, whether of a minor, or of a person of unsound mind, a good and sufficient bond, or for taking thereon insufficient surety; or for the neglect or omission to require the execution of a new, or of an additional bond, in the cases in which such bond is required by law, if he knows, or has good cause to believe that the case exists in which such new or additional bond should be required.

ARTICLE II.

GUARDIANS OF PERSONS OF UNSOUND MIND; APPOINTMENT; BOND.

2390 (2753, 2754). **Appointment.**—The court of probate has authority, and it is a duty to appoint guardians for persons of unsound mind residing in the county, having an estate, real or personal, and of persons of unsound mind residing without the state, having within the county property requiring the care of a guardian, under the limitations, and in the mode hereinafter prescribed.

2391. Guardian not appointed until after inquisition.—A guardian for a person alleged to be of unsound mind, residing in the county, must not be appointed until an inquisition has been had and taken as hereinafter directed.

2392 (2757). **Inquisition; proceedings.**—Upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the court of probate of the county in which such person alleged to be of unsound mind resides, must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof.

2393 (2758). **Jury summoned; writ of arrest.**—The judge of probate must issue a writ directed to the sheriff, commanding him to summon twelve disinterested persons of the neighborhood for the trial thereof, and also issue subpœnas for witnesses, as the parties may require, returnable to the time of trial; he must also issue a writ directed to the sheriff to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial.

2394 (2759). **Oath of jurors; vacancies filled.**—At the time set for the trial, if good cause be not shown for continuance, the jury must be impaneled and sworn well and truly to make inquisition of the facts alleged in the petition, and a true verdict render according to the evidence. If any of the jurors are excused from serving, fail to attend, or are set aside for any cause, their places may be supplied from the by-standers.

2395 (2760). **On verdict of insanity, papers filed, and guardian appointed.**—If the jury find by their verdict that the facts alleged in the petition are true, and that such person is of unsound mind, the court must cause the petition, and all the proceedings thereon to be recorded, and appoint a suitable guardian of such person.

Inquisition without notice invalid.—McCurry v. Hooper, 12 Ala. 823; Eslava v. Lepretre, 21 Ala. 504; Molton v. Henderson, 62 Ala. 426. **Service of writ of arrest sufficient.**—Fore v. Fore, 44 Ala. 478. **Appointment without inquisition void.** Eslava v. Lepretre, 21 Ala. 504; Moody v. Bibb, 50 Ala. 245; Molton v. Henderson, 62 Ala. 426. **If inquisition had before sheriff, void.**—Laughinghouse v. Laughinghouse, 38 Ala. 257. **Substantial compliance with statute sufficient.** Fore v. Fore, 44 Ala. 478. **Non compos mentis defined.**—In re Carmichael, 36 Ala. 514.

2396 (2761). **Proceedings when person of unsound mind is confined in asylum.**—If the person alleged to be of unsound mind is a resident of the county, and is at the time of the application confined in an hospital or asylum within or without the state, the inquisition may be had and taken without notice

As amended, Feb. 14, 1885, p. 118.

to him; but on the filing of the application, the court must appoint a guardian ad litem to represent and defend for him; it is the duty of such guardian by answer to put in issue the facts stated in the application, and to employ counsel at the expense of such person of unsound mind to appear and defend.

2397 (2804). **Application for revocation of guardianship.** At any time after the inquisition, the person ascertained to be of unsound mind, by himself, or by next friend, may apply in writing to the court of probate for a revocation of the proceedings against him, and of the letters of guardianship; the application to be accompanied by the certificate in writing of two physicians, or of two other competent persons, stating that after examination of such person, they believe him to be of sound mind.

2398 (2804). **Proceedings on application.**—On the filing of such application, the court must appoint a day for the hearing thereof, not more than ten days thereafter, and the guardian and the person at whose instance the inquisition was had and taken, must be cited to appear and show cause against it.

2399 (2805, 2806). **Contest of application.**—If the guardian, or the person at whose instance the inquisition was had and taken, appear and in writing deny the allegations of the application, the court must appoint a day for the trial of such contest, not more than ten days thereafter, and must cause a jury to be summoned for the trial thereof, and the like proceedings must be had as upon the original inquisition; or if there be no contest of the allegations of the application, and the court is satisfied of the truth thereof, a decree must be entered revoking the proceedings on the inquisition and the guardianship, and declaring that the ward must be restored to the custody and management of his estate.

2400 (2807). **Judgment on contest; costs thereof.**—If, on the trial of the contest, the jury find the facts stated in the application to be true, the court must enter a decree revoking the proceedings on the inquisition and the guardianship, and declaring that the ward must be restored to the custody and management of his estate; and must adjudge the costs as is just and equitable; but if the verdict of the jury negatives the facts stated in the application, a judgment of dismissal, at the costs of the applicant, or of the next friend, must be entered.

2401 (2803). **Revocation on application of guardian.**—If, at any time after his appointment, the guardian becomes satisfied that the ward has been restored to sanity, and is capable of managing his estate, and the judge of probate is of opinion, from the proof and the facts stated, that such representation is correct, he must make an order that the guardian be discharged, and that the estate of the ward be restored to him.

2402 (2755). **Non-resident persons of unsound mind.** The court of probate of a county in which a person of unsound mind residing without the state may have property, real or personal, requiring the care of a guardian, may appoint a guardian for the property of such person which may be within this state, if such person has been declared of unsound mind by a court having jurisdiction in the state of his residence.

2403 (2755). **Application for appointment of guardian for such non-resident; proceedings.**—The application for the

appointment of a guardian for such person, must be in writing, must be verified by affidavit, and must state the name, sex, age and residence of such person, the court by which he was declared of unsound mind, and the property requiring the care of a guardian. On the filing of such application, the court must appoint a day for the hearing thereof, of which notice must be given for three successive weeks by publication in some newspaper published in the county, or if there be no such paper published in the county, by publication in a paper published in an adjoining county, and a copy of such paper must by the judge of probate be mailed to such person at the post-office nearest his residence; and the court must appoint a guardian ad litem to represent and defend for such person, and it is the duty of such guardian to put in issue the facts stated in the application; if on the hearing the application is not granted, the court must render a decree against the applicant for all the costs of the proceedings, including the reasonable compensation of the guardian ad litem.

2404 (2756). **Selection of guardian.**—If there are two or more applicants for the guardianship of a person of unsound mind, the court must prefer that person who is of nearest relationship, and will, in the judgment of the court, best manage the estate of the ward.

2405 (2765, 2767). **General guardian; sheriff may be appointed.**—The general guardian of the county must be appointed guardian of a person of unsound mind, if no other suitable person applies for appointment and qualifies; and if there be no general guardian, the sheriff must be appointed.

2406. Bond of guardian.—The guardian, other than the general guardian for the county, or the sheriff, must, before the issue to him of letters of guardianship, enter into bond with sufficient sureties, payable to the judge of probate, in a penalty to be prescribed by the judge, which must be a sum not less than double the supposed or estimated value of the personal property of the ward, and double the supposed or estimated rental value of the real estate of the ward for a term of three years, or, at the discretion of the judge, may be a sum equal to double the supposed or estimated value of the estate of the ward, real and personal, with condition for the faithful performance of all the duties which are, or may be required of him by law. Feb. 13, 1879, p. 165.

2407. Bond on obtaining order to sell lands.—The guardian of a person of unsound mind, other than a general guardian for the county, or the sheriff, who has not given bond in double the supposed or estimated value of the estate of the ward, real and personal, must not, under any order or decree of the court of probate, make sale of the lands of the ward, until he has given bond with sufficient sureties, in a penalty equal to double the supposed or estimated value of such lands, payable to the judge of probate, and with condition that he will faithfully account for the proceeds of such sale. Ib.

2408 (2764). **New or additional bond may be required.** The judge of probate has authority, and it is a duty, whenever he deems it necessary for the safety of the ward, to require the guardian to give a new or additional bond; and if, on notice of

such requisition, such guardian fails for ten days to give such new or additional bond, to remove him and revoke or recall his letters.

2409 (2764). **Sureties may require a new or additional bond.**—The surety or the sureties of the guardian of a person of unsound mind may, on application in writing to the judge of probate, verified by affidavit, expressing an unwillingness to remain longer bound, obtain an order of the judge requiring such guardian to give a new and additional bond; and if, on notice of such requisition, such guardian fails for ten days to give such new or additional bond, he must be removed and his letters revoked.

2410. Meaning of term person of unsound mind.—The term person of unsound mind, as employed in this chapter, includes idiots, lunatics, or the insane.

ARTICLE III.

AUTHORITY AND DUTY OF GUARDIANS, WHETHER OF MINORS, OR OF PERSONS OF UNSOUND MIND.

2411 (2770). **Guardians to return an inventory.**—Within three months after the appointment, the guardian must make and subscribe, upon oath, an inventory of all the estate, real and personal, of the ward, and subsequently, as additional property may be received, which must be filed and recorded.

2412 (2773). **Management of ward's estate, and loan of his money.**—It is the duty of the guardian to manage the estate of his ward frugally, and to improve it to the best of his skill and ability. He must, if practicable, lend out all surplus money of the ward on bond and mortgage, or on good personal security, and, if the bond is not renewed annually, require the interest to be paid at the end of each year.

Loaning money.—McLean v. Hosea, 14 Ala. 194; Hall v. Hall, 43 Ala. 488; Newman v. Reed, 50 Ala. 297; Ashley v. Martin, Ib. 537; Lee v. Lee, 55 Ala. 590; s. c., 67 Ala. 407.

2413 (2774). **Debtors to guardians to pay compound interest.**—All contracts made with guardians, verbal or written, for the payment of money, bear compound interest after maturity, if not otherwise expressed; and judgments rendered thereon also bear compound interest.

See citations to section 2463.

Feb. 17, 1885, p. 161.

2414. Lease of lands.—The guardian may, publicly or privately, lease the lands of the ward for a term not exceeding one year, making a report thereof to the court of probate.

Ib.

2415 (2775). **Lease for longer term than one year.**—The court of probate, on the application in writing of the guardian, showing that it would be to the interest of the ward, may authorize the guardian to lease the lands of the ward, publicly or privately, for a term not exceeding ten years, reserving rent payable annually; such lease being subject to ratification or disaffirmance by the ward, if a minor, upon attaining majority, or if of unsound mind, upon restoration to sanity. The application must not be heard until after the appointment of a guardian ad litem to represent the ward, and until proof is made that the lease would be advantageous to the ward.

2416. Report of leasing.—If the application is granted, the guardian must, within thirty days after making the lease, report the same in writing, under oath, to the court of probate, accompanied with a duplicate of the lease; and if upon examination the court is satisfied that the terms of the order of the court have been complied with, and that the payment of the annual rent is properly secured, an order of confirmation must be made and entered of record. Until such order of confirmation, the lease is not valid and operative. If the court is not satisfied that there has been compliance with the terms of the order, or that the payment of the annual rent is secure, an order must be entered rejecting the report; and the guardian may proceed to a subsequent leasing, subject to rejection or confirmation by the court.

2417. Lease of mineral lands.—On the application in writing of a guardian, verified by affidavit, showing that it would be to the interest of the ward that mines or quarries should be opened on lands of the ward possessing, or supposed to possess minerals, ores, clay, stone, slate, or valuable deposits, or that mines, or quarries which have been opened should be worked, the court of probate may, by order, authorize the guardian to lease, publicly or privately, such lands for a term not exceeding ten years. Such order must not be made until after the appointment of a guardian ad litem to represent the ward, and until by proof the court is satisfied that it would be to the interest of the ward to lease the lands for the purpose of opening and working mines or quarries thereon, or for the working of mines or quarries which have been opened.

2418. Rent or royalty.—The court may authorize the guardian to lease such lands for a rent payable in money at such time as the court may appoint, or for a royalty or galeage rent, or for a footage rent, as to the court may seem most advantageous to the ward.

2419. Report of leasing.—The guardian must, within thirty days after making such lease, report the same in writing, under oath, to the court of probate, accompanied with a duplicate of the lease; and if upon examination the court is satisfied that the terms of the order have been complied with, and that the payment of the rent or royalty reserved is properly secured, an order of confirmation must be made and entered. Until such order of confirmation, the lease is not valid and operative. If the court is not satisfied that there has been compliance with the terms of the order, or that the payment of the rent or royalty reserved is properly secured, an order rejecting the report must be entered; and the guardian may proceed to a subsequent leasing, subject to rejection or confirmation by the court.

2420. Lands held in common with adults.—Such lease must not be made of lands held in common with persons who are of full age, without their consent in writing, or unless they join in the execution thereof.

2421 (2778). **Improvements or repairs on real estate.**—It is the duty of the guardian to keep in tenantable repair and condition the real estate of the ward, and he has authority to make all such improvements and repairs thereon as are necessary and proper for that purpose; but if such improvements or repairs cannot be made without an expenditure from the prin-

cipal of the funds of the ward, such expenditure must not be made without an order of the court of probate; and such order must not be made without proof, by two disinterested witnesses, of facts which show that it would be advantageous to the ward.

2422 (2777). **Estate of ward may be kept together.**—If the estate of the ward consists of a farm or plantation, of stock, farming implements and provisions, the court of probate, on the application of the guardian, verified by affidavit, showing that it would be to the interest of the ward, may order such estate to be kept together, and the farm or plantation cultivated for such period, not exceeding ten years, as the court may prescribe.

2423. Powers of guardian in such case.—A guardian, having authority under the preceding section to keep together the estate of the ward, has authority to purchase such stock, farming implements and provisions, and to employ such laborers as may be necessary for the proper and profitable cultivation of such farm or plantation.

2424. Guardian, in such case, must make annual settlements—A guardian, keeping together the estate and cultivating the lands of the ward, must make a settlement annually; and if on such settlement it appears that the estate of the ward is being diminished in value by reason of the keeping of the estate together, and the cultivation of the lands, the court must revoke the order authorizing the same.

2425 (2777). **Estate held in common or jointly.**—If several minors, having a farm or plantation, stock, farming implements and provisions in common or jointly, have a common guardian, he may obtain authority and keep the estate together, subject to the provisions of the two preceding sections.

2426. Compromise of debts due ward.—The court of probate may authorize a guardian to compromise any claim or debt due the ward, which is doubtful of collection, and has not become so by reason of the negligence of the guardian.

2427. Proceedings to obtain order of compromise.—An order of compromise must not be granted otherwise than on the application in writing of the guardian, verified by affidavit, describing the claim or debt, stating the terms on which a compromise can be effected, and the facts relied on as showing that the compromise would be of advantage to the ward; the court, on the filing of the application, must appoint a day for the hearing thereof, not less than five, nor more than ten days thereafter, and must appoint a guardian ad litem to represent the ward, who must put in issue the facts stated in the application, and require proof thereof.

2428. Order of compromise.—If, on the hearing, the court is satisfied the claim or debt has not become of doubtful collection by reason of the negligence of the guardian, and that a compromise thereof on the terms proposed would be of advantage to the ward, an order must be entered authorizing the guardian to make the compromise on the terms proposed, and to make report thereof. On the filing of the report, if the court is satisfied that the order has been complied with, an order of confirmation must be entered; otherwise the report must be set aside.

2429. Real estate may be taken in compromise.—The court may authorize the guardian to take real estate in compromise of the debt or claim, if satisfied that it is of advantage to the ward, the title to such real estate being conveyed to the ward, and the conveyance thereof filed with the report of compromise; and the report must not be confirmed until the court is satisfied that the title conveyed to the ward is good and sufficient.

2430. Sale of debts or other choses in action of ward. The court of probate may authorize the guardian to make sale of debts or other choses in action of the ward, which are of doubtful collection or recovery, and have not become so by reason of the negligence of the guardian.

2431. Proceedings to obtain order of sale.—An order to sell such debts or choses in action must not be made otherwise than upon the application in writing of the guardian, verified by affidavit, describing the debts or choses in action, or exhibiting a descriptive list thereof, and stating the facts relied on as showing that a sale thereof would be of advantage to the ward; the court, on the filing of the application, must appoint a day for the hearing thereof, not less than five, nor more than ten days thereafter, and must appoint a guardian ad litem to represent the ward, who must put in issue the facts stated in the application, and require proof thereof.

2432. Order of sale.—If, on the hearing, the court is satisfied of the truth of the facts stated in the application, and that such debts or choses in action are of doubtful collection or recovery in consequence of no negligence of the guardian, an order must be entered authorizing the sale thereof at public outcry to the highest bidder, at the court-house door of the county, for cash, or on such credit as the court may prescribe; notice of the time and place, and of the terms of the sale having first been given by advertisement for three consecutive weeks in a newspaper published in the county, if there be such newspaper, and if there be not, by posting notice at the court-house door and three other public places. But the debtor or other person against whom such debt or chose in action may exist, cannot purchase at such sale the debt or chose in action existing against him, either directly or indirectly.

2433. Report of sale.—The title of the ward to such debts or choses in action will not vest in the purchaser until the sale has been reported to, and confirmed by the court; within thirty days after making such sale, the guardian must make report thereof to the court, and if the court is satisfied that the terms of sale have been complied with, an order of confirmation must be entered, and the guardian must be ordered to transfer in writing to the purchaser or purchasers such debts or choses in action. If, from any cause, the guardian cannot make report of the sale, the court, on its own motion, may inquire if such sale has been made in compliance with the order, and if, on inquiry, it is satisfied that the sale has been made in compliance with the order, may authorize a commissioner to make transfer of such debts or choses in action to the purchaser or purchasers.

2434 (2782). **Sale to pay debts, etc., of person of unsound mind.**—The court of probate may authorize the guardian of a person of unsound mind to sell any property of such person,

real or personal, when necessary for the payment of debts or liabilities of such person, incurred before the inquisition against him, or before the appointment of a guardian, or incurred after such inquisition and the appointment of a guardian for the maintenance of such person, or for the maintenance of his family.

2435. Proceedings to obtain order of sale.—The order of sale must not be made otherwise than upon the application in writing of the guardian, verified by affidavit, stating the facts, showing a necessity for the sale, and describing the property of which sale is to be made; on the filing of the application the court must appoint a day for the hearing thereof, and must appoint a guardian ad litem to represent the ward, who must put in issue the facts stated in the application, and must require proof thereof; if the application is for the sale of personal property, the day appointed for the hearing must not be less than ten, nor more than twenty days after the filing of the application; or if it be for the sale of lands, or any interest therein, must not be less than twenty, nor more than thirty days after the filing of the application.

2436. Hearing; order of sale.—If, on the hearing of the application, the court is satisfied from the evidence adduced, which must be taken by deposition, that a necessity exists to sell the property, either for the payment of debts or liabilities incurred before the inquisition, or before the appointment of the guardian, or for the maintenance of the ward, or for the maintenance of his family, an order of sale must be made and entered, and the terms of sale must be prescribed by the court; if the sale is of lands, it must be made at the court-house door of the county; if of personal property, at such place as the court may direct.

2437. Notice; report of sale.—If the sale is of personal property, notice thereof for twenty days must be given by advertisement in some newspaper published in the county, or by posting notice at the court-house door of the county, the one or the other as the court may order; if of lands, notice thereof must be given for thirty days by advertisement for four consecutive weeks in some newspaper published in the county, or if there be no such paper published in the county, then by posting notice at the court-house door and three other public places in the county. Within thirty days after the sale, the guardian must report the same to the court for confirmation.

2438. Confirmation of report of sale.—If the court is satisfied that the sale of the lands, or any interest therein, has been fairly conducted, and that, at such sale, the sum bid is equal to the fair value of the lands, and that the terms of sale, as prescribed by the court, have been complied with, and that the purchase-money has been paid, or if the sale is on credit, that the payment of the purchase-money is properly secured, an order of confirmation must be entered; but the title of the ward is not divested until the purchase-money is fully paid, the fact of payment reported to the court, and a conveyance is executed under the order of the court.

2439 (2785). **Sale for re-investment; when allowed, and how conducted.**—For good cause shown the court of probate may authorize the sale of personal and real property of the

ward, in such manner as it may direct, and direct its investment in bonds, notes, or bills of exchange at interest, on mortgage security, or in other property in the name of the ward; but no sale of real estate must be had on less than thirty days' notice, which notice must be published once a week for four successive weeks in a newspaper nearest the place where the sale is to be made; and returns of sales must be made and confirmed as sales of land by administrators.

Hudgens v. Jackson, 51 Ala. 514.

2440 (2786). **Terms, notice and confirmation of sale.** The court must direct whether the sale shall be made for cash or on credit, and must require at least thirty days' notice of the time, place and terms of the sale to be given. The sale is not complete until confirmed by the court, nor does the title vest in the purchaser until all the purchase-money is paid.

2441 (2788). **Guardians may invest in real estate.**—Guardians may invest the money of their wards in real estate situated in any part of the state; and the guardians, acting in good faith, shall not be individually responsible for a depreciation in value of the land purchased with the funds of the ward, when such depreciation may result from causes which cannot be prevented by the guardian.

2442 (2789). **Title, how made.**—The real estate purchased by the guardian, with the funds of the ward, must be conveyed to the ward, but must be managed and controlled by the guardian for the benefit of the ward; and the guardian must render annual accounts of the rents and profits of the lands to the court having jurisdiction of the guardianship.

2443 (2790). **Liability of guardian.**—The guardian is liable to the ward for any loss sustained by the ward by the failure or defect of title to the land purchased by the guardian for the ward.

2444 (2783). **Maintenance of family of person of unsound mind.**—The court of probate, on the application of the guardian of a person of unsound mind, must direct what portion of the income, or of the principal of the estate of such person, may be appropriated by the guardian to the support of the family, including the education of the minor children of such person.

2445 (2779, 2780). **Maintenance and education of minors.** If the income of the estate of a minor be insufficient for his maintenance and education in a manner suitable to his prospects and condition in life, the court of probate, on the application of the guardian in writing, may order him to appropriate so much, or such part of the principal of the estate of the minor as may be necessary for his maintenance and education.

St. Joseph v. Augustini, 55 Ala. 493.

2446 (2779, 2780). **Contents of application.**—The application must be verified by the affidavit of the guardian, and must state the facts which show the necessity for the appropriation of the principal of the estate of the ward to his maintenance and education.

2447 (2779, 2780). **Hearing evidence.**—On the filing of the application, the court must appoint a guardian ad litem to represent the minor, who must put in issue the facts stated in the

application, and require proof thereof; and the court must fix a day for the hearing, not less than thirty days from the day of filing the application; and the facts therein stated must, on the hearing, be proved to the satisfaction of the court.

2448 (2780). **Sale for maintenance and education of minor.** If the income of a minor is insufficient for his maintenance and education, in a manner suitable to his prospects and condition in life, and such maintenance and education cannot be furnished him otherwise than by a sale of his estate, real or personal, the court of probate may, on the application in writing of the guardian, order a sale of the property of the minor, real or personal, or so much thereof as may be necessary, for his maintenance and education.

Mahon v. Tatum, 69 Ala. 466; Hudson v. Helmes, 23 Ala. 585.

2449 (2780). **Contents of application.** — The application must be verified by the affidavit of the guardian, and must state the facts which show the necessity for the sale.

2450. Notice; hearing; evidence.—On the filing of the application, the court must appoint a guardian ad litem to represent the minor, who must put in issue the facts stated in the application, and require proof thereof; and the court must appoint a day for the hearing thereof; if the application is for the sale of personal property, the day appointed must be not less than twenty days after the filing of the application, and if it be for the sale of lands, or any interest therein, not less than thirty days after the filing of the application. Notice of the application, and of the day appointed for the hearing, must be given the minor, if he be above the age of fourteen years and reside in the state, by service of citation upon him; and, if he be under that age, and the father or mother is not the guardian, notice must be given to the father, if living and residing in the state, or, if he be dead, to the mother, if living and residing in the state; and, if the application be for the sale of lands, notice thereof must be given by advertisement for three successive weeks in some newspaper published in the county, or, if there be no such paper, by posting notice at the court-house door of the county, and three other public places; an order of sale must not be made, unless the facts stated in the application are proved to the satisfaction of the court.

2451. Order of sale.—If, on the hearing, the court is satisfied of the truth of the facts stated in the application, an order of sale must be entered, and the court must prescribe the terms and the notice which must be given of the time and place of sale, in all cases not ordering a sale of lands on less than thirty days' notice, or at any other place than the court-house door of the county, and that the notice thereof be given by advertisement in a newspaper published in the county, if there be such paper.

2452. Report; confirmation of sale.—If the sale be of personal property, the guardian must within ten days make report thereof to the court of probate, and if it be of lands, or any interest therein, must make report thereof within twenty days to the court of probate; and if the court is satisfied the sale has been fairly conducted, in compliance with the terms of the order, and that the lands, or the interest therein, was bid off for a reasonable sum, and the purchase-money has been paid, or if

the sale is on credit, that the payment of the purchase-money is properly secured, an order of confirmation must be entered; but the title of the minor is not divested until the purchase-money is fully paid, the fact of payment reported to the court, and a conveyance is executed under the order of the court.

ARTICLE IV.

SETTLEMENTS OF GUARDIANS.

2453. Jurisdiction of court of probate.—The court of probate from which the appointment of a guardian of a person of unsound mind, or of a minor, is derived, has jurisdiction of the settlement, partial or final, of the accounts of the guardian.

2454 (2771). **Partial settlements.**—If not otherwise directed, the guardian must, at least once in three years, file in the court of probate an account of his guardianship, accompanied with the vouchers, showing his receipts and disbursements, which must be verified by the affidavit; and on the filing of such account and vouchers, the court must appoint a guardian ad litem to represent the ward.

2455. Notice of settlement.—The court must also appoint a day for the settlement, of which notice must be given, as the court may direct, either by advertisement for three successive weeks in a newspaper published in the county, or for the same length of time by posting notices at the court-house door and at three other public places in the county.

2456. Auditing and stating account.—On the day appointed, or on any other day to which the settlement may be continued, the court must proceed to examine the vouchers, and to audit and state the account, requiring evidence in support of all such vouchers or items of the account as may be contested, or as may not, on examination, appear to the court to be just and proper, such evidence to be taken by affidavit, or by any other legal mode; and if any voucher or item be rejected, all costs accruing on the contest or examination thereof must be taxed against the guardian personally.

2457. Decree on account.—After the examination of the vouchers, and the audit and statement of the account, the court must render a decree passing the same, and declaring the amount of the charges against the guardian, and of the credits allowed him, which must be entered of record; and the account and vouchers must be recorded.

2458. Partial settlement presumed correct.—Upon the final settlement, a partial settlement must be taken and presumed as correct; but any item of the account may be re-examined, and if on re-examination it is found incorrect, the item must be disallowed, or allowed only so far as its correctness may appear.

Ashley v. Martin, 50 Ala. 537.

2459. Final settlement.—On the death, resignation, or removal of the guardian, or on the expiration of his authority otherwise, or on the arrival of the ward at full age, or on his restoration to sanity, or on his death, or on the marriage of the ward, if a woman, and her husband is of age, a final settlement

of the guardianship must be made; such settlement, in the event of the death of the guardian, to be made by his personal representative.

Jurisdiction statutory and limited.—Lewis v. Allred, 57 Ala. 628. **On marriage, female ward may require settlement.**—Wise v. Norton, 48 Ala. 214. **Settlement during minority and before resignation, void.**—Lee v. Lee, 67 Ala. 406; Glass v. Glass, 76 Ala. 368. See, also, Spencer v. Spencer, 50 Ala. 445. **Necessary parties when guardian a married woman.**—McGinty v. Mabry, 23 Ala. 672; Whiten v. Graves, 40 Ala. 578. **Jurisdiction of chancery court.**—Bruce v. Strickland, 47 Ala. 192; Lee v. Lee, 55 Ala. 590; s. c., 67 Ala. 406; Hailey v. Boyd, 64 Ala. 399; Fulgham v. Herstein, 77 Ala. 496. **Settlement when guardian becomes non compos mentis.**—Modawell v. Holmes, 40 Ala. 391. **Settlement made while relation continues, void.**—Lewis v. Allred, 57 Ala. 628. **Need not appear that successor was made a party.**—McLeod v. Mason, 5 Port. 223.

2460. Proceedings for final settlement.—The guardian, or his personal representative, must file in the court of probate a full account of the guardianship, accompanied by the vouchers, and verified by affidavit; and on the filing of such account and vouchers, the court must appoint a guardian ad litem to represent the ward, if he be a minor or of unsound mind.

Guardian ad litem.—Decree not invalid because it shows that the minor was represented on settlement by the succeeding guardian, instead of guardian ad litem. Jones v. Fellows, 58 Ala. 343. Settlement without acceptance of appointment by guardian ad litem, void.—Laird v. Reese, 43 Ala. 148. What not an acceptance. Ib. Statute does not require that minor over fourteen years of age should have opportunity of choosing guardian ad litem. Stabler v. Cook, 57 Ala. 22. Settlement made with infant properly represented by guardian ad litem, as binding on infant as a similar settlement made with an adult.—Stabler v. Cook, 57 Ala. 22. Appointment without notice an irregularity merely.—Frierson v. Travis, 39 Ala. 150. But to sustain decree, the record must affirmatively show that the guardian ad litem accepted the appointment.—Ib. Neither guardian nor sureties can avoid settlement because ward was not represented by guardian ad litem, but the ward may.—May v. Duke, 61 Ala. 53.

2461. Notice of settlement.—The court must appoint a day for the settlement, of which ten days' notice must be given to the succeeding guardian, if there be such guardian, or to the personal representative of the ward, if the ward be dead, or to the ward, if he be a resident of the state, and has arrived at full age, or has been restored to sanity, by the service of citation; and notice must also be given, as the court may direct, either by advertisement for three successive weeks in some newspaper published in the county, or for the same length of time by posting notice at the court-house door, and three other public places in the county.

Notice by publication sufficient.—Stabler v. Cook, 57 Ala. 22. **What not a compliance with statute.**—Frierson v. Travis, 39 Ala. 150. **When presumed on collateral attack.**—Stabler v. Cook, 57 Ala. 23. **When guardian cannot object to want of notice.**—Treadwell v. Burden, 8 Ala. 660; McLeod v. Mason, 5 Port. 223.

2462. Auditing and stating account.—On the day appointed, or on any other day to which the settlement may be continued, the court must proceed to examine the vouchers, and to audit and state the account, requiring evidence in support of all such vouchers or items of the account as may be contested, or as may not on examination appear to the court to be just and proper; such evidence to be taken by affidavit, or in any other legal mode; and if any voucher or item be rejected, all costs accruing on the contest or examination thereof must be taxed against the guardian, or his personal representative, and not against the ward or his estate.

May v. Duke, 61 Ala. 53; Cunningham v. Pool, 9 Ala. 615; Newman v. Reed, 50 Ala. 297.

2463. Decree on account.—After the examination of the vouchers, and the audit and statement of the account, the court must render a decree passing the same, and declaring the amount due the ward, if there be any amount due him, which must be entered of record, and the account and vouchers must be recorded.

Conclusiveness of decree.—Chilton v. Parks, 15 Ala. 671; Lewis v. Allred, 57 Ala. 628; Foust v. Chamblee, 51 Ala. 75; Hutton v. Williams, 60 Ala. 107. **Force and effect of decree.**—Treadwell v. Burden, 8 Ala. 660; Waldrom v. Waldrom, 76 Ala. 285. **Decree against sureties not authorized.**—Ib. **When, though void, an admission of indebtedness.**—Hutton v. Williams, 60 Ala. 107; Hughes v. Mitchell, 19 Ala. 268. **Interest; compound interest; liability of guardian for.**—Bryant v. Craig, 12 Ala. 354; Calhoun v. Calhoun, 41 Ala. 369; Brand v. Abbott, 42 Ala. 499; Tyson v. Sanderson, 45 Ala. 364; Vaughan v. Bibb, 46 Ala. 153; Starling v. Balkum, 47 Ala. 314; Childress v. Childress, 49 Ala. 237; Ashley v. Martin, 50 Ala. 537. **Personal decree against ward not authorized.**—Duval v. Chandron, 10 Ala. 391. **When guardian not entitled to notice of time of rendition of decree.** Allman v. Owen, 31 Ala. 167. **Binding on sureties.**—Gravett v. Malone, 54 Ala. 19. **When void.**—Ib. **When will not be reversed** for failure to set out names of all the wards.—Newman v. Reed, 50 Ala. 297.

2464. Enforcement of decrees against guardians, or their representatives, and sureties.—The court of probate may, by attachment, compel a guardian to obey its orders or decrees; and all final decrees rendered against a guardian, or against the personal representative of the guardian, on a final settlement, have the force and effect of a judgment at law, on which execution may issue against the guardian, or his personal representative, and against the sureties of the guardian, whether such settlement is voluntary or involuntary, and whether such settlement is made by the guardian while living, or by his personal representative after his death; and upon such decrees, process of garnishment may issue from the court of probate in like cases and manner as it may issue on judgments in courts of law, and may, in like manner, be prosecuted to judgment against the garnishee.

Treadwell v. Burden, 8 Ala. 660; Smith v. Jackson, 56 Ala. 25.

2465. Compensation of guardian.—A guardian is entitled for his services to commissions of two and one-half per cent. on his disbursements, and two and one-half per cent. on his receipts, and on final settlement an allowance must be made of actual expenses necessarily incurred by him; and for special or extraordinary services rendered, such compensation must be allowed as is just; but no allowance of actual expenses, or for special or extraordinary services must be made, except upon an itemized account of such expenses, or of such special or extraordinary services, verified by affidavit; and in its decree the court must state each item of such services for which compensation is allowed.

Allen v. Martin, 36 Ala. 330; s. c., 34 Ala. 442; Neilson v. Cook, 40 Ala. 498.

2466. Commissions on money, etc., paid or delivered to ward or successor.—Upon the final settlement of a guardianship, the guardian, if he has not been guilty of fraud or gross negligence, must be allowed reasonable commissions, not exceeding two and one-half per cent., on the value of all personal property surrendered to the ward, or to his personal representative, or on the amount of money paid or decreed to be paid to the ward, or to his personal representative, or to a succeeding guardian; but if the value of such personal property and of such money exceeds twenty thousand dollars, the commissions on the excess must not be more than one per cent.

ARTICLE V.

COMPELLING SETTLEMENTS OF GUARDIANSHIP.

2467. Compelling partial settlement.—The court of probate may, at any time it is deemed necessary for the safety of the ward, require a guardian to make partial settlement of his guardianship; of the requisition the guardian must have notice for ten days by the service of citation, and may appear and show, if he can, that such settlement is not necessary.

2468. Partial settlement may be compelled.—On the application of the ward by next friend, showing satisfactory cause, the court may issue a citation to the guardian, requiring him to appear and show cause why he should not make a partial settlement of his guardianship, of which citation there must be service for ten days before the day appointed for the appearance of the guardian; and if on the hearing it should appear that there is no satisfactory cause for ordering such settlement, the application must be dismissed at the costs of the next friend.

2469. Neglect to make partial settlement.—If a guardian fails to make a partial settlement as often as such settlement is required of him, the court must issue to him a citation, requiring him to make such settlement; and all the costs thereof, and of the citation, must be taxed against him personally, and must not be charged against the ward or his estate, unless he appears in answer to the citation and shows a satisfactory excuse for his failure, and file his accounts and vouchers for such settlement.

2470. Compelling final settlement.—On the termination of a guardianship by the arrival of the ward at full age, or by his restoration to sanity, or by the death of the ward, or by the resignation or removal of the guardian, or on the expiration of his authority otherwise, the court of probate may issue a citation, requiring the guardian to appear at any time within ten days after the service thereof, on a day therein named, and file his accounts and vouchers for a final settlement; or if the guardian resides without the state, may appoint a day for him to appear and file his accounts and vouchers for a final settlement, of which notice must be given for three successive weeks by advertisement in some newspaper published in the county, or if there be no such paper published in the county, by posting notice at the court-house door and three other public places in the county.

Childress v. Childress, 49 Ala. 237; Waldrom v. Waldrom, 76 Ala. 285; Moore v. Baker, 39 Ala. 704; Bogia v. Darden, 41 Ala. 322; Craft v. Ferrell. 21 Ala. 351; Hughes v. Ringstaff, 11 Ala. 563.

2471. Representative of deceased guardian required to make final settlement.—On the death of a guardian, at any time after the expiration of six months from the qualification of his personal representative, such representative may be required, on ten days' notice, by the service of citation, to appear and make settlement of the guardianship of his testator or intestate.

2472. Guardian failing to obey citation.—If a guardian fails to obey a citation requiring him to appear and file his accounts and vouchers for a final or partial settlement, the court of probate may, by attachment, compel his appearance, and

may, if on appearance he refuses to file such accounts and vouchers, or to show good cause for his omission, imprison him for a period not exceeding six months.

2473. Court may state account against guardian or his representative.—If a guardian, after notice, fails to file his accounts and vouchers for a final or partial settlement, or, if the personal representative of a guardian, after notice, fails to file the accounts and vouchers of his testator or intestate for final settlement, the court of probate has authority to state an account against the guardian, or against his personal representative, from the materials on file or of record in the court, and from such evidence as may be adduced, charging such guardian with all wherewith he is by law chargeable, and crediting him with all wherewith by law he ought to be credited.

2474. Notice of statement of account, and of day appointed for passing same.—After the statement of such account, the court must appoint a day for passing the same, of which notice must be given by advertisement, for three successive weeks, in some newspaper published in the county, or, if there be no such paper, by posting notice at the court-house door and three other public places in the county.

2475. Appearance of guardian or of his representative. If, on or before the day so appointed, the guardian, or the personal representative of the guardian, if the account is stated against such representative, appears and files his accounts and vouchers for settlement, and pays such costs as have accrued under the proceedings, the court must set aside such proceedings and proceed to settlement in the manner prescribed by law, on the accounts and vouchers so filed.

2476. Failure of guardian or representative to appear. But, if such guardian or personal representative fails to appear and file his accounts and vouchers for settlement, any person having an interest may appear and contest such account, and the court must hear and determine such contest, and, whether such contest be made or not, must render a decree on such account, which has the force and effect of a decree rendered on a voluntary settlement by such guardian or personal representative.

ARTICLE VI.

RESIGNATION AND REMOVAL OF GUARDIAN.

2477 (2768). **Resignation.**—A guardian may resign by writing subscribed by him, or his duly authorized agent, filed in the court of probate, and on the filing of such resignation, the fact thereof must be entered of record, and an order made revoking his letters of guardianship; but such resignation does not affect the liability of the guardian or his sureties.

2478 (2769). **Removal of guardian.**—A guardian may be removed and his letters of guardianship revoked for any of the following causes:

1. For his removal from the state.
2. For a willful failure to file in the time prescribed an inventory of the estate of the ward.
3. For a willful disobedience to an order of the court, requiring him to make a partial settlement of his guardianship.

4. For continued or habitual inebriety, or imbecility of mind, or continued sickness rendering him incapable of the discharge of his duties.

5. Because of a conviction of felony, for which he is sentenced to imprisonment in the penitentiary, or to hard labor, for a term of two years or longer.

6. For the waste of the ward's property, or neglect of his affairs, or for any other good and sufficient cause.

Repitoe v. Hall, 1 Stew. 166; Eiland v. Chandler, 8 Ala. 781; Cockrell v. Cockrell, 36 Ala. 673. See, also, Desribes v. Wilmer, 69 Ala. 25; Huie v. Nixon, 6 Port. 77; Lee v. Lee, 55 Ala. 590.

2479. Application for removal; notice.—An application for the removal of a guardian may be made by the ward, by next friend, which application must be in writing, verified by affidavit, and must specify the grounds of removal; on the filing of the application, the court must appoint a day for the hearing, of which notice must be given the guardian for at least five days by the service of citation, if he resides in the state, and if he resides without the state, by advertisement in some newspaper published in the county for at least three successive weeks, or if there be no paper published in the county, by posting notice at the court-house door and three other public places in the county.

2480. Hearing.—On the day appointed, or on any other day to which the hearing may be continued, the court may proceed to hear the evidence and pass upon the application; but if the cause of removal alleged is continued or habitual inebriety, or imbecility of mind, or continued sickness, or for the waste of the property of the ward, or neglect of his affairs, either party, on request, is entitled to a trial of the issues of fact by a jury.

2481. Costs.—If the application is determined against the ward, the next friend must be taxed with the costs; if determined against the guardian, he must be taxed with the costs.

2482. Removal by court.—The court of probate may, without an application by the ward, remove a guardian for any of the causes specified, first giving him notice as is required on the filing of an application for removal, and must appoint a guardian ad litem to represent the ward in any proceeding taken by it for the removal.

ARTICLE VII.

REMOVAL OF PERSON OR PROPERTY OF WARD.

2483 (2802). **Removal of person or property from one county to another.**—The court of probate from which letters of guardianship have issued, has authority to order the removal to another county of the person and property of a ward, if it be shown that such removal will advance the interests of the ward.

2484 (2796, 2802). **Mode of obtaining authority for removal.**—Authority for such removal may be obtained on the application in writing, verified by affidavit, of the guardian, or of the ward by next friend, stating the facts which show that

the removal will advance the interests of the ward; and if it be made by the ward by next friend, a day must be appointed for the hearing, of which ten days' notice must be given the guardian by the service of citation; if it be made by the guardian, a day, not less than ten days after the filing of the application, must be appointed for the hearing, and a guardian ad litem appointed to represent the ward, who must put in issue the facts stated in the application, and require proof thereof.

2485. (2796). **Order of removal.**—If, on the hearing, the court is satisfied that the removal will advance the interests of the ward, an order authorizing it must be made and entered; otherwise, the application must be dismissed, and the guardian, or the next friend, as the application may be made by the one or the other, must be taxed with the costs.

2486. Grant of guardianship in county to which removal is authorized.—If the removal authorized is of the person and property of the ward, a transcript of the record of the proceedings must be made and certified, and filed in the court of probate of the county to which the removal is to be made; and on the filing of such transcript, such court has jurisdiction to grant guardianship of the person and property of the ward; and on such grant being made, and a transcript thereof, duly certified, being filed in the court of probate authorizing the removal, such removal may be made; the guardian so appointed has full authority to demand, recover and receive the property of the ward from and after the making of the removal.

2487. Settlement of former guardian.—On the filing of such transcript, the court must require the guardian of its appointment to make a final settlement of his guardianship; and when such settlement is made, must certify a transcript thereof to the court of probate of the county to which the removal was authorized.

2488. Removal of property only.—If the removal authorized is of the property only of the ward, the jurisdiction of the court authorizing the removal is not affected, and it must retain jurisdiction of the guardianship, as if such removal had not been authorized.

2489 (2800). **Removal of property of minor residing without state.**—When the parent having the legal custody of a minor child, whether the father or mother, resides without the state, or removes with such child from the state, becoming a resident of another state, the court of probate, or the court of chancery, having jurisdiction of the estate of the minor, has authority to order the removal of the property of the minor to the state of the residence of the parent.

2490. Mode of obtaining authority for removal.—The application for the order of removal must be made by the parent, must be in writing, verified by affidavit, accompanied by a transcript, duly certified, of the appointment of a guardian for such minor by a court of competent jurisdiction in the state of the residence of the parent, and of the bond of such guardian, with sureties approved by such court, and in a penalty equal to double the value of the property which is to be removed.

2491. Order of removal.—The court, if satisfied of the truth of the application, and that the transcript of the appointment of

the guardian in the state of the residence of the parent is in due form, and properly certified, and that the court making the appointment had jurisdiction, must make an order authorizing the removal of the property of the minor, and authorizing such guardian to receive the same.

2492 (2801). **Guardian in this state to make settlement.** If such minor have a guardian in this state, of the appointment of the court, or subject to the jurisdiction of the court, an order must be made and entered, requiring such guardian to make a final settlement of his guardianship.

2493 (2796). **Removal of ward and his estate to another state, when permitted.**—The guardian may remove the person and estate of his ward to another state, by making a full settlement, with the judge of the probate court where his letters were granted, of his guardian accounts, and procuring a transcript of the record of a court of competent jurisdiction of such other state, certified according to the act of congress, showing the appointment of such person as guardian of the ward, the execution of bond with surety for the performance of the trust, in twice the value of the estate of the ward, and adducing testimony that the sureties to such bond are sufficient. Thereupon, the judge of probate must make an order authorizing such removal.

Cook v. Wimberly, 24 Ala. 486.

As amended, Feb. 28, 1887, p. 148.

2494 (2797). **Removal of property when guardian and ward are non-residents.**—When the guardian and ward are both non-residents, and the ward is entitled to any property in this state, or is, or will be entitled to any money from any estate, the administration of which is pending in this state, whether such estate shall or shall not have been finally settled, and the money or property may be removed to another state without conflict with any restriction or limitation thereupon, and without impairing the right of the ward thereto, such money and property may be received and removed to the state of the residence of the ward, upon application of the guardian to the judge of probate of the county in which the property of the ward, or the principal part thereof, may be, or in which such administration may be pending, in the manner following.

Carlisle v. Tuttle, 30 Ala. 613; Lary v. Craig, Ib. 631.

2495 (2798). **Notice and evidence in such proceeding.** The guardian must produce a transcript from the records of a court of competent jurisdiction, certified according to the act of congress, showing that he has been appointed guardian of the minor in the state in which he and the ward reside, and has duly qualified as such according to the laws thereof, and given bond, with surety, for the performance of his trust; and must also give ten days' notice to the resident executor, administrator, or guardian, if there be such, of the intended application; thereupon, if good cause be not shown to the contrary, and the judge of probate shall be satisfied, upon proof being made, that it will be for the interest of the minor, such judge of probate must make an order granting such guardian leave to remove the property of his ward to the state or place of his residence, which is an authority to him to sue for and recover the same, in his own name, for the use of his ward.

2496 (2799). **When representative discharged.** — Such order is a discharge of the executor, administrator, or other person, in whose possession such property may be at the time of the order made.

ARTICLE VIII.

JUDGE OF PROBATE CUSTODIAN OF FUNDS OF MINOR, OR OF PERSON OF UNSOUND MIND.

2497 (2756). **Judge of probate must not act as guardian.** The judge of probate is incompetent, during his term of office, to act as guardian of any minor, or person of unsound mind, residing in his county, but may be custodian of the funds of a minor, or of a person of unsound mind, not having a guardian, as is authorized in this article.

2498 (2809). **Funds of which judge of probate is custodian.** As amended, Feb. 13, 1879, p. 53. The funds of a minor or of a person of unsound mind, residing in this state, not having a general guardian, not exceeding in amount one hundred dollars, accruing on a settlement made by an executor or administrator, or guardian, in the court of probate, or from sales of property made under the decree or order of the court by commissioners, to effect partition or division, or in the hands of a predecessor in office, must be paid to the judge of probate.

Bradley v. Harden, 73 Ala. 70.

2499 (2810). **Duty and authority of judge.**—It is the duty of the judge to keep such money safely, and he has authority to expend the same in the maintenance and support of the minor or person of unsound mind, or his wife and minor children; and for receiving and keeping such money he is entitled to a commission of one and one-half per cent.

2500 (2811). **Judge must make settlements with clerk of circuit court.**—At the expiration of his term of office, or on the appointment of a guardian for such minor or person of unsound mind, or on the death of either, or on the arrival at full age of such minor, or if a female, on her marriage, or on the expenditure of such money, the judge must make with the clerk of the circuit court a final settlement of his accounts and vouchers; of the day appointed for such settlement, the clerk must give notice for three consecutive weeks, by posting notices at the courthouse door and three other public places in the county; and he must carefully examine such accounts and vouchers, allowing only such vouchers as are shown to be just and proper; and must charge such judge interest on the money received, unless he makes and files an affidavit that he has not used such money, or allowed its use by others; and if a balance is found due on such settlement from such judge, the clerk must state the amount thereof. For his services in making such settlement, the clerk is entitled to a fee of one dollar and a half.

2501 (2813). **Balance recoverable by motion.**—If such judge fails, for three days after demand made by the party entitled to any such balance, to pay such balance, the same with interest is recoverable of him and the sureties on his official bond, or either of them, on two days' notice, by motion in the circuit court, or before a justice of the peace, having jurisdiction, with twenty per cent. damages on the principal of such balance.

CHAPTER 5.

PROTECTION OF ESTATES OF INTEMPERATE PERSONS.

2502 (2815). **Bill by relatives of intemperate.**—When any unmarried man, over twenty-one years of age, is by reason of intemperance, unfit to manage his estate, or is wasting or squandering it, and thereby in danger of being reduced to poverty and want, his brothers or sisters or next of kin, or any or either of them, may themselves, or by their next friend, if minors or married women, file their bill in chancery to preserve the estate of such intemperate person from further waste, and for general relief.

2503 (2816). **Allegations of bill; decree.**—The bill provided for in the preceding section must specify the cause for which relief is prayed, and the estate proposed to be secured, and such person of intemperate habits must be made a party defendant thereto; if the allegations of the bill are admitted, either expressly or by a failure to answer thereto, or it is established by proof that the allegations of the bill are true, and that such person is wasting his estate, or is for the cause alleged unfit for its management, so that such person will probably be reduced to want, the chancellor must deprive him of all further control over it, and provide for its safe keeping by the appointment of a trustee.

2504 (2817). **Duty of trustee.**—The trustee appointed under the preceding section must manage and superintend the affairs of the estate, and, from the avails thereof, provide for the support of such intemperate person, or of his wife and children, in the event that he has married after the institution of the suit, which support must be suitable to the means and estate of such intemperate person.

2505 (2818). **Security of estate pending suit.** — Pending the suit provided for in this chapter, the chancellor must, by injunction or otherwise, secure the estate against further waste; but no such decree affects the rights of creditors acquired previously to the institution of the suit.

2506 (2819). **Restoration of estate.**—On the petition of the person whose estate has been, by the provisions of this chapter, committed to the control of a trustee, and on notice to such trustee, and on satisfactory proof of the reformation of such intemperate person, and of his fitness to have charge of his estate, the chancellor must order it to be restored to him.

TITLE VI.

EXEMPTIONS.

CHAPTER 1.—Exemptions from levy and sale under process.
2.—Exemptions from administration.
3.—Waiver of exemptions.

CHAPTER 1.

EXEMPTIONS FROM LEVY AND SALE UNDER PROCESS.

ARTICLE 1.—Property exempt
2.—Claim and contest.

ARTICLE I.

PROPERTY EXEMPT.

2507 (2820). **Homestead exemption.**—The homestead of every resident of this state, with the improvements and appurtenances, not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be, to the extent of any interest he may have therein, whether a fee or less estate, or whether held in common or in severalty, exempt from levy and sale under execution or other process for the collection of debts contracted after 23d day of April, 1873, during his life and occupancy, and if he leave surviving him a widow and minor child or children, or either, during the life of the widow and minority of the child or children; but the area of the homestead shall not be enlarged by reason of any incumbrance thereon, or of the character of the estate or interest owned therein by him.

Residence within the state essential to the right of homestead, or other exemption.—Talmadge v. Talmadge, 66 Ala. 199; McCrary v. Chase, 71 Ala. 540; McBrayer v. Dillard, 49 Ala. 174; Murphy v. Hunt, 75 Ala. 438. Domicil of husband is the domicil of the wife.—Talmadge v. Talmadge, 66 Ala. 199. Whether an absconding debtor can claim homestead, quære.—McBrayer v. Dillard, 49 Ala. 174. **"Debts contracted;" what liabilities within.**—Clingman v. Kemp, 57 Ala. 195; State v. Allen, 71 Ala. 543. **What not within.**—Meredith v. Holmes, 68 Ala. 190; Williams v. Bowden, 69 Ala. 433; Vincent v. State, 74 Ala. 274. **Occupancy essential to homestead.**—Kaster v. McWilliams, 41 Ala. 302; McConnaughy v. Baxter, 55 Ala. 379; Stowe v. Lillie, 63 Ala. 257; Martin v. Lile, Ib. 406; Blum v. Carter, Ib. 235; Dexter v. Strobach, 56 Ala. 233; David v. David, Ib. 49; Boyle v. Shulman, 59 Ala. 566; Preiss v. Campbell, Ib. 635; Lyne v. Wann, 72 Ala. 43; Scaife v. Argall, 74 Ala. 473; Waugh v. Montgomery, 67 Ala. 573. When intention of, and preparation for occupancy sufficient.—Blum v. Carter, 63 Ala. 235. **In what homestead may be claimed.** In lands owned by tenants in common.—McGuire v. Van Pelt, 55 Ala. 344; Blum v. Carter, 63 Ala. 235; Snedecor v. Freeman, 71 Ala. 140. In lands owned by married woman as her statutory separate estate.—Weiner v. Sterling, 61 Ala. 98; Bender v. Meyer, 55 Ala. 576. In dwelling-house on leased land. Watts v. Gordon, 65 Ala. 546. **Extent of homestead.**—Miller v. Marx, 55 Ala, 322; David v. David, 56 Ala. 49; Garner v. Bond, 61 Ala. 84; Snedecor v. Freeman, 71 Ala. 140; Clark v. Spencer, 75 Ala. 49. **Abandonment of homestead.**—Boyle v. Shulman, 59 Ala 566; Stowe v. Lillie, 63 Ala. 257; Lehman v. Bryan, 67 Ala. 558; Scaife v. Argall, 74 Ala. 473; Murphy v. Hunt, 75 Ala. 438; McConnaughy v. Baxter, 55 Ala. 379; Kaster v. McWilliams, 41 Ala. 302; Alford v. Lehman, 76 Ala. 526. **Resident without family may claim.**—Webb v. Edwards, 46 Ala. 17. **Right governed by law of force when debt contracted.**—Watts v. Burnett, 56 Ala. 340; Wilson v. Brown, 58 Ala. 62; Blum v. Carter, 63 Ala. 235; Keel v. Larkin, 72 Ala.

493; Cochran v. Miller, 74 Ala. 50; DeGraffenreid v. Clark, 75 Ala. 425. **And by the facts existing at time lien attaches.**—McCrary v. Chase, 71 Ala. 540; Murphy v. Hunt, 75 Ala. 438 (overruling Watson v. Simpson, 5 Ala. 233); Lyons v. Conor, 57 Ala. 181; Hudson v. Kelly, 70 Ala. 393; Scaife v. Argall, 74 Ala. 473. **Repeal of law destroys right.**—Clark v. Snodgrass, 66 Ala. 233. **Claim by bankrupt must be asserted in bankrupt court.**—Gayle v. Randall, 71 Ala. 470. **When law unconstitutional.**—Wilson v. Brown, 58 Ala. 62. **Voluntary conveyances of, not void.** Fellows v. Lewis, 65 Ala. 343; Lehman v. Bryan, 67 Ala. 558; Wright v. Smith, 66 Ala. 514; Alley v. Daniel, 75 Ala. 403. **When equity will reform conveyance of homestead.**—Gardner v. Moore, 75 Ala. 394. **Right of homestead does not follow and adhere to purchase-money.**—Giddens v. Williamson, 65 Ala. 439. **When lost by failure to assert.**—Bell v. Davis, 42 Ala. 460; Waugh v. Montgomery, 67 Ala. 573; Sherry v. Brown, 66 Ala. 51; Martin v. Lile, 63 Ala. 406; Wright v. Grabfelder, 74 Ala. 460; DeGraffenreid v. Clark, 75 Ala. 425. **Interest of wife in homestead.**—Vancleave v. Wilson, 73 Ala. 287; Seaman v. Nolen, 68 Ala. 463.

2508 (2822). **Alienation of homestead when owner a married man.**—No mortgage, deed, or other conveyance of the homestead by a married man shall be valid without the voluntary signature and assent of the wife, which must be shown by her examination, separate and apart from him, before an officer authorized by law to take acknowledgments of deeds, and the certificate of such officer upon, or attached to such mortgage, deed, or other conveyance, which certificate must be substantially in the following form:

"State of Alabama, } I, ——— ———, judge of ——— (or
——— county. } other officer, as the case may be), do hereby certify that on the —— day of ———, 18—, came before me the within named ——— ———, known to me (or made known to me) to be the wife of the within named ——— ———, who, being examined separate and apart from the husband touching her signature to the within ———, acknowledged that she signed the same of her own free will and accord, and without fear, constraints, or threats on the part of the husband. In witness whereof, I hereto set my hand, this —— day of ———, 18—.

——— ———,

"Judge (or other officer, as the case may be)."

Conveyances of homestead by husband alone, or defectively executed by wife, a nullity.—McGuire v. Van Pelt, 55 Ala. 345; Miller v. Marx, Ib. 322; Balkum v. Wood, 58 Ala. 642; Garner v. Bond, 61 Ala. 84; Slaughter v. McBride, 69 Ala. 510; Scott v. Simons, 70 Ala. 352; Snedecor v. Freeman, 71 Ala. 140; DeGraffenreid v. Clark, 75 Ala. 425; Crim v. Nelms, 78 Ala. 604. **It does not operate an estoppel against the husband.**—Halso v. Seawright, 65 Ala. 431; Alford v. Lehman, 76 Ala. 526; Crim v. Nelms, 78 Ala. 604. **But if more than homestead embraced, conveyance valid as to excess.**—McGuire v. Van Pelt, 55 Ala. 344; Garner v. Bond, 61 Ala. 84; Snedecor v. Freeman, 71 Ala. 140; DeGraffenreid v. Clark, 75 Ala. 425. **Deed, though void, a cloud upon the title, and color of title.**—Watson v. Mancill, 76 Ala. 600. **Instruments operating ordinarily as agreements to convey**, cannot be enforced in equity as to homestead, though properly acknowledged by wife.—Jenkins v. Harrison, 66 Ala. 345. **When acknowledgment insufficient.**—Scott v. Simons, 70 Ala. 352; Motes v. Carter, 73 Ala. 553. **When signature and assent sufficiently shown prior to act of April 23, 1873.**—Miller v. Marx, 55 Ala. 322; Lyons v. Conor, 57 Ala. 181; Cahall v. Citizens' Asso'n, 61 Ala. 233; Forsyth v. Preer, 62 Ala. 443; Scott v. Simons, 70 Ala. 352; Butts v. Broughton, 72 Ala. 294. **Statute does not apply to conveyances of homestead when the property of the wife.**—Weiner v. Sterling, 61 Ala. 98; Dawson v. Burrus, 73 Ala. 111. **Acknowledgment may be taken before sworn clerk of judge of probate.**—Halso v. Seawright 65 Ala. 431; Hood v. Powell, 73 Ala. 171. **Sufficient, though wife is not named as grantor.** Dooley v. Villalonga, 61 Ala. 129; Hood v. Powell, 73 Ala. 171. **But when it is stated in deed that she joins in conveyance** "for the sole purpose" of conveying her inchoate right of dower, her voluntary signature and assent are not sufficiently shown.—Long v. Mostyn, 65 Ala. 543. **Defective acknowledgment may be cured after delivery.**—Cahall v. Citizens' Asso'n, 61 Ala. 232; Vancleave v. Wilson, 73 Ala. 387; Hood v. Powell, Ib. 171. **But cannot have retroactive effect.**—Balkum v. Wood, 58 Ala. 642. **Conveyance of dwelling-house on leased land within statute.** Watts v. Gordon, 65 Ala. 546. **Effect of acknowledgment, when impeached by**

wife.—Coleman v. Smith, 55 Ala. 368; Miller v. Marx, Ib. 322; Cahall v. Citizens' Asso'n, 61 Ala. 233; Worrell v. McDonald, 66 Ala. 572. **Deficiencies in certificate cannot be supplied by parol.**—Scott v. Simons, 70 Ala. 352.

2509 (2822). **What liens not affected by exemptions.**—The provisions of this title shall not, however, be so construed as to prevent any lien attaching to the homestead in favor of any laborer, mechanic, or material-man for work and labor done, or for materials furnished, or in favor of any vendor for unpaid purchase-money, or so as to affect any deed, mortgage, or lien on such homestead, lawfully executed or created.

Newbold v. Smart, 67 Ala. 326.

2510 (2823). **Exemption of burial place and church-pew.** In favor of such resident there shall also be exempt from levy and sale, under execution or other process, any lot or lots in cemeteries, or elsewhere, set apart or used as a burial place for himself or family, and any pew or seat in any church or place of worship, held and occupied by him for the use of himself or family.

2511 (2820, 2823). **Exemption of personalty.**—The personal property of such resident, to the amount of one thousand dollars in value, to be selected by him, and, in addition thereto, all necessary and proper wearing apparel for himself and family, and all family portraits or pictures, and all books used in the family, shall also be exempt from levy and sale under execution or other process for the collection of debts contracted after the 23d day of April, 1873.

Williamson v. Harris, 57 Ala. 40; Borden v. Bradshaw, 68 Ala. 362; Enzor v. Hurt, 76 Ala. 595; Daniels v. Hamilton, 52 Ala. 105; Ala. Conference v. Vaughan, 54 Ala. 443; Weis v. Levy, 69 Ala. 209; Brown v. Leitch, 60 Ala. 313; Schuessler v. Wilson, 56 Ala. 516; Daniels v. Hamilton, 52 Ala. 105; Dane v. Loomis, 51 Ala. 487; Alley v. Daniel, 75 Ala. 403; Bibb v. Janey, 45 Ala. 329. See, also, citations to section 2507.

2512 (2823). **Exemption of wages of employes.**—The wages, salaries, or other compensation of laborers or employes, residents of this state, for personal services, to the amount of twenty-five dollars per month, shall also be exempt from levy under writs of garnishment or other process for the collection of such debts.

Enzor v. Hurt, 76 Ala. 595; S. & N. R. R. Co. v. Falkner, 49 Ala. 115.

2513 (2820). **When partnership property not exempt.**—No property, real or personal, held or owned by partners as partnership property, or purchased with partnership funds for partnership purposes, shall be the subject of homestead or other exemption, as against co-partners or partnership creditors.

Giovanni v. First Nat. Bank, 55 Ala. 305; Little v. McPherson, 76 Ala. 552.

2514 (2845). **Exemptions in favor of counties and municipal corporations.**—All property, real or personal, belonging to the several counties or municipal corporations in this state, and used for county or municipal purposes, shall be exempt from levy and sale under any process, judgment, or decree whatsoever.

ARTICLE II.

CLAIM AND CONTEST.

2515 (2828). **Declaration of claim of exemption; how made and filed.**—Any resident of this state, entitled to, and desiring to claim a homestead or other exemption from levy and sale under execution or other process, may, at any time, make and file in the office of the judge of probate of the county in which the property is situate, if a homestead, or if personal property, of the county in which such resident resides, a declaration in writing, subscribed and sworn to by him, describing the property selected and claimed by him as exempt, item by item, in case of personal property, with its value; and other declarations may, from time to time as occasion may require, be made and filed.

Wright v. Grabfelder, 74 Ala. 460; Alley v. Daniel, 75 Ala. 403; Clark v. Spencer, Ib. 49; Randolph v. Little, 62 Ala. 396; Block v. Bragg, 68 Ala. 291; Abbott v. Gillespy, 75 Ala. 180; Weis v. Levy, 69 Ala. 209.

2516 (2829). **Record, receipt for, and copy of declaration.** Such declarations of claims of exemptions shall be recorded in a separate book, kept for that purpose, and the judge of probate, on request, shall give a receipt therefor, and shall furnish a certified copy thereof, when requested, on payment of lawful fees therefor.

2517 (2828, 2831). **Effect of declaration as evidence and notice.**—After the filing of such declaration, the claim of exemption therein asserted shall be taken and considered as prima facie correct; and the filing thereof shall operate as notice of its contents.

Weis v. Levy, 69 Ala. 209; Abbott v. Gillespy, 75 Ala. 186; Alley v. Daniel, Ib. 402; Todd v. McCraney, 77 Ala. 468.

2518 (2829). **Fees of judge of probate.**—The fees for filing, recording, copying and certifying such declarations shall be the same as are allowed by law for filing, recording, copying and certifying deeds.

2519 (2830). **Effect of filing claim as to levy on property therein embraced.**—After such declaration of claim has been filed for record, the property therein embraced shall not be subject to levy, unless there is indorsed on the process the fact that there has been a waiver of exemption as to the kind of property on which the levy is sought to be made, or the claim is contested.

See citations to section 2515.

2520 (2830). **How contest of such claim instituted.**—A plaintiff, in person, or by his agent or attorney, may contest a claim of exemption after a declaration thereof has been filed, by making and filing with the officer holding the process an affidavit that, in his belief, either (1) the claim is invalid entirely, or (2) it is invalid in part, or is excessive, specifying wherein such invalidity or excess consists, and if excessive, also specifying the property alleged to be in excess, to be, in all cases, the last named in the claim; and, if the claim is of personal property, he must also deliver to the officer a bond in double the value of the property sought to be levied on, with sureties to be approved by the officer, payable to the defendant claiming

the exemption, and conditioned that if the plaintiff fails in the contest, he will pay the defendant all such costs and damages as he may sustain by reason of the wrongful institution of the contest; and thereupon the officer shall proceed to make a levy, and, within three days thereafter, shall notify the defendant in writing of the same.

Ex parte Redd, 73 Ala. 548; Totten v. Sale, 72 Ala. 488; McCrary v. Chase, 71 Ala. 540; Clark v. Spencer, 75 Ala. 49; Murphy v. Hunt, Ib. 438.

2521 (2834). **Claim and contest when no declaration filed; notice of claim; effect of failure to contest.**—The right of homestead or other exemption shall not be waived or lost by a failure, before the levy of process, to file for record a declaration claiming the same; but the defendant, in person, or by his agent or attorney, may, at any time after the levy and prior to a sale, file with the officer making the levy a claim in writing, verified by oath, to such property, or any part thereof, as exempt, and if of a part, describing the same, and, within three days thereafter, such officer must give to the plaintiff, his agent or attorney, written notice of the filing of the claim; and thereupon the plaintiff, in person, or by his agent or attorney, may contest the claim in the mode provided in the last preceding section, except that no bond need be executed; and on the institution of such contest, the officer shall, within three days thereafter, give the defendant written notice of the same. But if the plaintiff does not institute such contest within ten days after notice of the claim, the levy shall be discharged, and the property, if personal, be returned to the defendant, and the plaintiff shall be taxed with the costs of making the levy and keeping the property; but when the levy has been made on personal property the defendant must file with his claim the statement of personal property, choses in action and money, with the value and location thereof, as required by the provisions of section 2525 (2837).*

Andrews v. Melton, 51 Ala. 400; Mead v. Larkin, 66 Ala. 87; Block v. Bragg, 68 Ala. 291; Weis v. Levy, 69 Ala. 209; Wright v. Grabfelder, 74 Ala. 460; Zelnicker v. Brigham, Ib. 598; Clark v. Spencer, 75 Ala. 49; Murphy v. Hunt, Ib. 440; Alley v. Daniel, Ib. 404; Toenes v. Moog, 78 Ala. 558; Sherry v. Brown, 66 Ala. 51; Block v. George, 70 Ala. 409; Ex parte Redd, 73 Ala. 548; McCrary v. Chase, 71 Ala. 540; Ex parte Kelly & Howze, 75 Ala. 543.

2522 (2836). **When, on contest, property delivered to defendant.**—When any contest of a claim of exemption to personal property has been instituted, the defendant claiming the exemption may, within five days after service of notice of the contest, deliver to the officer making the levy a bond in double the amount of the value of the property, to be fixed by, and with sureties to be approved by the officer, payable to the plaintiff, and conditioned that if the defendant is cast in the contest he will, within thirty days thereafter, deliver the property to such officer, and will pay all costs and damages that may result from its detention, and thereupon the property shall be delivered to the defendant.

2523 (2836). **When property delivered to plaintiff; when to defendant without bond.**—If the defendant fails to deliver such bond within the five days allowed him, and the plaintiff

* The last clause of this section commencing with the words, "But when the levy has been made on personal property," was added by joint committee.

shall, within five days thereafter, deliver to the officer a bond in the amount and with the sureties provided in the preceding section, conditioned that if the plaintiff is cast in the contest, he will, within thirty days thereafter, deliver the property to the defendant, and pay all costs and damages that may result from the detention thereof, the property shall be delivered to the plaintiff; but if the plaintiff fails to deliver such bond within the five days allowed, the property must be returned to the defendant without bond.

Ex parte Kelly & Howze, 75 Ala 543.

2524 (2836). **On contest, papers returned to court.** — In case of such contest, the officer making the levy must, within fifteen days after the institution of the contest, return the process and other papers to the court to which the process is returnable, accompanied with a full statement of the facts.

2525 (2837). **When inventory of personalty must be filed; effect of failure to file.**—On any contest of a claim of exemption to personal property, on the plaintiff's written demand, made at any time before the first day of the term of the court to which the process is returned, the defendant claiming the exemption shall, within the first three days of the term, file a full and complete inventory, duly verified by oath, of all his personal property, except the wearing apparel, portraits, pictures and books specifically exempted from levy and sale, with the value and location of each item of such property, and of all money belonging to him, whether in his possession or held by others for him, and of all debts and choses in action belonging to him, or in which he is beneficially interested, with the value of each of them; and if such inventory is not filed within the time prescribed, the plaintiff shall not be required to tender an issue on the claim, but the court must render judgment by default against the defendant, unless good and sufficient cause be shown to the contrary.

Ex parte Redd, 73 Ala. 548.

2526 (2838). **Issues in, and trial of contest; exceptions and appeal.**—The contest of any claim of exemption shall stand for trial at the first term of the court after the return of the process, when, if both parties appear, an issue or issues shall be formed under the direction of the court, as to whether the property in contest, or any and what part of it, is exempt as claimed; and such issue or issues, if in the circuit court, or court of like jurisdiction, or probate court, or before a justice of the peace, shall be tried as other cases therein are tried, or if in the chancery court, as the chancellor may direct; and in all cases, the party in whose favor the levy was made shall be deemed the plaintiff, upon whom shall rest the burden of proof, and both parties shall be entitled to the same right of objection, exception and of appeal, as in other cases. No contest, however, of a homestead exemption shall be had before a justice of the peace; but when such contest is founded on the levy of process returnable before such officer, the same, with all the papers, shall be returned to the next term of the circuit court, or other court having like jurisdiction, and there tried as other contests are tried in such court.

Sherry v. Brown, 66 Ala. 51; Levy v. Moog, 69 Ala. 63

2527 (2838). **Trial by jury in probate court, or before justice.**—When a contest of a claim of exemption is triable in the probate court, or before a justice of the peace, either party shall be entitled to a trial by jury, on demand therefor, made on or before the first day of the term; but if not then made, the right of trial by jury shall be waived. Before justices of the peace, however, the jury shall be composed of seven householders or freeholders of the precinct or ward.

2528 (2838). **Judgment on contest.**—If the plaintiff fails to appear in support of his contest, or if on the trial all the property in contest is found exempt, judgment must be rendered against him for the costs of the levy and contest, and releasing the property from the levy; but if the defendant fails to appear in support of his claim of exemption, or if on the trial all the property is found liable to the process, judgment must be rendered against him for costs, and condemning the property to sale.

2529 (2839). **Judgment, when claim of personalty excessive.**—When, on a contest of a claim of exemption to personal property, the issue is whether or not the claim is excessive, and such issue is found in favor of the plaintiff, it must also be ascertained, by the finding of the court, or the verdict of the jury, as the case may be, how much and what portion of the property is exempt, describing the same, with its value, approximating in value, as nearly as practicable, one thousand dollars; and the residue of the property shall be sold, and out of the proceeds of sale there shall be paid to the defendant an amount which, when added to the value of the property found to be exempt, will make the exemption equal to one thousand dollars, and the balance shall be applied to the payment of the costs and satisfaction of the process.

2530. Proceedings when inventory shows property not claimed as exempt.—When, on a contest of a claim of exemption to personal property, an inventory filed by the defendant on the plaintiff's demand discloses other personal property owned by the defendant and subject to sale under the process, not embraced in the claim of exemption, the defendant, at the time of filing the inventory, shall deliver such property to the officer making the levy, who shall, whether he has returned the process or not, in case of an execution, sell the property, as in other cases, and apply the proceeds to the satisfaction of the execution; or, in case of an attachment, or other mesne process, shall hold the property to await the final determination of the suit; and, in either event, he shall make due return of the facts to the court.

2531 (2839). **Failure to include property in inventory, or to deliver property not claimed as exempt.**—When, on a contest of a claim of exemption to personal property, an inventory has been filed by the defendant, an issue may be tendered by the plaintiff that the defendant has other personal property subject to levy and sale under the process, not embraced in the inventory, or that the inventory discloses that the defendant has other personal property subject to levy and sale under the process, not embraced in the claim of exemption, which he has failed to deliver to the officer levying the process; and if such issue is determined in favor of the plaintiff, the value of such

property shall be ascertained and estimated in ascertaining the amount of the exemption to which the defendant is entitled, and be deducted from his claim in contest, as if such property had been selected by him as part of his exemption.

2532 (2836). **When bond given, value of property and damages assessed.**—When bond has been executed by the plaintiff or defendant for the forthcoming of the property in contest, the value of the property and the damages resulting from its detention must be assessed by the court or jury trying the contest; and if the unsuccessful party fails for twenty days after judgment to deliver the property and pay the damages, as required by the condition of the bond, it shall be the duty of the sheriff to make due return of that fact; and upon such return being made, the bond shall have the force and effect of a judgment, and execution may issue thereon against the obligors on the the bond for the value of the property and the damages assessed, or either, and costs.

2533 (2842). **Claim to money and choses in action garnished; contest.**—When money or choses in action, or personal property,* are garnished, and the defendant claims the same, or any part thereof, as exempted, he shall file his claim thereto in writing, verified by oath, in the court in which such proceedings are pending, accompanied by a statement setting forth the personal propery, choses in action and money, and the location and value thereof, as required in the statement to be filed under the provisions of section 2525 (2837); and such claim the plaintiff, in person, or by his agent or attorney, may contest as in cases of contest after declaration filed; and such contest shall be tried and determined as other contests of claims of exemption are tried and determined. If the defendant has notice of the garnishment, the claim of exemption must be interposed before judgment of condemnation; but if not, such judgment shall not operate to impair or affect his claim of exemption. Notice of the garnishment must be in writing, and may be given by the plaintiff or garnishee.

Randolph v. Little, 62 Ala. 396; Todd v. McCraney, 77 Ala. 468.

2534 (2832). **Homestead exemption; proceedings on contest when it exceeds value or area allowed.**—If, on the trial of a contest of a claim of homestead exemption, it is found that the homestead, as claimed, exceeds two thousand dollars in value, or one hundred and sixty acres in area, the court shall forthwith issue an order to the sheriff, returnable to the next term thereafter, commanding him to summon three disinterested householders or freeholders of the county in which the homestead is situated, who, after having been sworn by the sheriff, or some officer authorized to administer oaths, to faithfully discharge their duty, shall, if practicable, set off and allot, by metes and bounds, the homestead exempt to the defendant from levy and sale under the process, having regard both to the quality and value of the real estate, and to the selection of the defendant, and taking land most contiguous to the dwelling, and including such dwelling and appurtenances; and the commissioners, as soon as practicable, shall make return of the homestead so allotted and set off by them, in writing subscribed by them, to

* "Or personal property" inserted by joint committee.

the sheriff, who shall make due return thereof to the court issuing the order; and the homestead thus allotted and set off shall be released from the levy, and the residue of the land sold under the order of the court, unless, for good cause shown, the court shall set aside the commissioners' return, in which event, another order for summoning commissioners shall be issued. If the commissioners summoned, or any of them, shall fail to act, the sheriff shall summon others to fill their places.

Pomeroy v. Bunting, 42 Ala. 250; Jones v. DeGraffenreid, 60 Ala. 145; Peevey v. Cabaniss, 70 Ala. 253; Keel v. Larkin, 72 Ala. 493; Clark v. Spencer, 75 Ala. 49; Hardy v. Sulzbacher, 62 Ala. 44.

2535 (2832). **Proceedings in such case, when area cannot be reduced.**—If the homestead, after having been reduced to its lowest practicable area, still exceeds in value two thousand dollars, thereby rendering it impracticable to allot and set it off under the preceding section, the commissioners shall so make return to the sheriff, who shall thereupon proceed, as in other cases, to advertise and offer the same for sale under the process; and if at the sale he receives a bid therefor exceeding two thousand dollars, he shall sell the same, and of the purchase-money two thousand dollars shall be paid to the defendant, or into court for him, in lieu of the homestead, and the excess only shall be applied to the satisfaction of the process; but, if no bid in excess of two thousand dollars shall be received, the sheriff shall discharge the levy at the plaintiff's cost, and return the process; and thereafter no process issued to enforce the plaintiff's demand shall be levied on such homestead, so long as it shall continue a homestead, except on the written demand of the plaintiff, accompanied by an offer in writing to purchase the same for an amount exceeding two thousand dollars, which offer must state the amount, and, at the election of the defendant, shall be binding on the plaintiff.

See citations to preceding section.

2536 (2832). **Disposition of purchase-money in lieu of homestead, when defendant dies.** — When a sale is made under the preceding section, and the defendant dies before receiving the two thousand dollars standing in lieu of the homestead, the same shall be paid to his personal representative, who shall receive and hold it subject to the homestead rights of the defendant's widow and minor child or children, or either, if there be such; but, if there be none such, the personal representative shall first apply the same to the payment of the demand for the enforcement of which the process issued, and the balance he shall administer as personal assets of the estate.

2537 (2837). **When wife or minor child may interpose claim; revivor.**—If a husband or father, entitled to a homestead or other exemption, absconds, or abandons his family, or leaves the state, or is insane, or is confined under a charge or conviction for felony or misdemeanor, or is under any other disability or inability, the wife, or if there is no wife, the minor child or children, residents of this state, with the intention so to continue, shall be entitled to interpose any and all claims of homestead or other exemption which the husband or father could have interposed; but the right to such exemptions shall continue only so long as the wife and minor child or children, or either, shall remain bona fide residents of this state. In the event

As amended, March 1, 1881, p. 121.

of the death of the husband or father pending any contest of a claim of homestead, or other exemption, such contest may be revived in the name of the widow, if there be one, or if there be none, in the name of the minor child or children, if there be such; but if neither widow nor minor child is left surviving, the claim of exemption shall abate, and the property ordered sold for the satisfaction of the process.

2538 (2832). **When homestead may be sold on bill in equity.** When the homestead, after being reduced to the lowest practicable area, exceeds two thousand dollars in value, and the husband has aliened the same by deed, mortgage, or other conveyance, without the voluntary signature and assent of the wife, shown and acknowledged as required by law, the husband, or if he fails to act, the wife, or if there is no wife, or she fails to act, his minor child or children may, by bill in equity, have the land sold, and the homestead interest separated from that of the alienee.

2539 (2843). **When homestead not abandoned by leasing or temporary leaving.**—When a declaration of claim to a homestead exemption has been filed in the office of the judge of probate, leaving the homestead temporarily, or a leasing of the same shall not operate an abandonment thereof, or render it subject to levy and sale; but the right thereto shall remain the same as if the actual occupancy thereof had continued.

Boyle v. Shulman, 59 Ala. 566; Stowe v. Lillie, 63 Ala. 257; Lehman v. Bryan, 67 Ala. 559; Scaiffe v. Argall, 74 Ala. 473; Murphy v. Hunt, 75 Ala. 438.

2540 (2833). **When no action lies against officer levying process on exempt property.**—If no declaration of claim of exemption has been filed in the office of the judge of probate, or if so filed, and the same is contested, no action shall lie against the officer levying the process, on the ground that the property levied on is exempt.

Alley v. Daniel, 75 Ala. 406.

2541 (2835). **Property not sold until contest terminated; lien preserved.**—When a contest of a claim of exemption has been instituted, the property in contest shall not be sold by the officer until the contest is decided; but the lien thereon under the process or levy shall not be destroyed or impaired by the pendency of the contest.

Sims v. Eslava, 74 Ala. 594.

2542 (2844). **By what law right governed; how ascertained, etc.**—The right of homestead or other exemption shall be governed by the law of force when the debt or demand was created; but the mode and remedy for asserting, ascertaining, contesting and determining claims thereto shall be as prescribed in this title.

Taylor v. Pettus, 52 Ala. 287; Nelson v. McCrary, 60 Ala. 301; Giddens v. Williamson, 65 Ala. 439; Kelly v. Garrett, 67 Ala. 304; Carlisle v. Godwin, 68 Ala. 137; Slaughter v. McBride, 69 Ala. 510; Peevey v. Cabaniss, 70 Ala. 253; Cochran v. Miller, 74 Ala. 50; Spencer v. Clark, 75 Ala. 49; DeGraffenreid v. Clark, 75 Ala. 425; Todd v. McCraney, 77 Ala. 468.

CHAPTER 2.

EXEMPTIONS FROM ADMINISTRATION.

ARTICLE 1.—Property exempt.
2.—Setting apart exemptions to widow and minor children.

ARTICLE I.

PROPERTY EXEMPT.

2543 (2821, 2827). **Homestead exemption in favor of widow and minor children.**—The homestead of any resident of this state, leaving surviving him at his death a widow and minor child or children, or either, with the improvements and appurtenances, not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be exempt from administration and the payment of debts contracted after the 23rd day of April, 1873, in favor of such widow and minor child or children, or either, in any event, during the life of the widow, or the minority of the child or children, whichever may last terminate; and the rents and profits of such homestead, if there be a widow and no minor child, shall enure to her benefit during her life; or if there be a minor child or children, and no widow, then to the benefit of such child or children during minority; or if there be both widow and minor child or children, then to their equal benefit during the life of the widow and the minority of the child or children. Such homestead may be retained by the widow or minor child or children, until it is ascertained whether the estate is solvent or insolvent; and if the estate is insolvent, it shall vest in them absolutely.

By what law right of exemptions governed.—Garner v. Bond, 61 Ala. 84; Davis v. Davis, 63 Ala. 293; Slaughter v. McBride, 69 Ala. 510; Munchus v. Harris, Ib. 506; Miller v. Marx, 55 Ala. 322; Watts v. Burnett, 56 Ala. 340; Bolling v. Jones, 67 Ala. 508; Smith v. Cockrell, 66 Ala. 64; Skinner v. Chapman, 78 Ala. 376; Bell v. Hall, 76 Ala. 546. **Dower no bar.**—Jordan v. Strickland, 42 Ala. 315; Johnston v. Davenport, Ib. 317; Chisolm v. Chisolm, 41. Ala. 327. **Not to be diminished because widow owns statutory separate estate.**—Darden v. Reese, 62 Ala. 311; Thompson v. Thompson, 51 Ala. 493. **Dissent from will not necessary.**—Hubbard v. Russell, 73 Ala. 578. **Family of non-resident not entitled to exemptions.** Talmadge v. Talmadge, 66 Ala. 199; Auerbach v. Pritchett, 58 Ala. 451. **Nor when family are non-residents, though husband resided here.**—Ex parte Pearson, 76 Ala. 521. **When not affected by removal from state.**—Munchus v. Harris, 69 Ala. 506. **In what land entitled to homestead.**—Weber v. Short, 55 Ala. 311 (overruling Pazzala v. Campbell, 46 Ala. 35); Chambers v. McPhaul, Ib. 367; David v. David, 56 Ala. 49; Bolling v. Jones, 67 Ala. 508; Munchus v. Harris, 69 Ala. 506; Smith v. Cockrell, 66 Ala. 64; Englehardt v. Young, 76 Ala. 534. **Estate or interest of widow and minor children in homestead.**—Miller v. Marx, 55 Ala. 322; Hunter v. Law, 68 Ala. 365; Barber v. Williams, 74 Ala. 331; Fellows v. Lewis, 65 Ala. 343. **Alienation to third person an abandonment in favor of heirs.**—Barber v. Williams, 74 Ala. 331. **Homestead when estate insolvent.**—Munchus v. Harris, 69 Ala. 506; Hartsfield v. Harvoley, 71 Ala. 231; Baker v. Keith, 72 Ala. 121.

2544 (2840). **Exemption in lieu of homestead.**—If such decedent, at the time of his death, has no homestead exempt to him from levy and sale under process, his widow and minor child or children, or either, shall be, unless they have obtained the benefit of such exemption under section 2536 (2832), entitled to a homestead exemption out of any other real estate

owned by him, which, in value, area, interest and estate, shall conform to the provisions of the preceding section.

2545 (2824). **Exemption of specific personal property.**—In favor of the widow and minor child or children, or either, of such decedent, there shall also be exempt from administration and the payment of debts contracted after the 23d day of April, 1873, all the wearing apparel of the decedent, and of the widow and minor children, all yarn and cloth on hand intended for their use and consumption, all books kept for use in the family, all family portraits and pictures, all grain, stores and groceries on hand, necessary for the support of the family for twelve months after the decedent's death, and all bedding and household and kitchen furniture, necessary for the use and comfort of the family; to be selected by the widow, if there be one, or if there be no widow, or she fails to act, by the guardian of the minor child or children.

Davis v. Davis, 63 Ala. 293; Mitcham v. Moore, 73 Ala. 544.

2546 (2825). **Additional personal property exempt.**—In favor of such widow and minor child or children, or either, there shall also be exempt from administration and the payment of such debts, personal property belonging to such decedent at the time of his death, to the amount of one thousand dollars in value, to be selected and set apart for them; but if the estate is solvent, the value of such property so selected and set apart shall be, on final settlement and distribution of the estate, credited on the distributive shares of the widow and children receiving the benefit thereof, or on their respective legacies, if by will disposition is made of the entire estate; and any of such children, on leaving the family, shall be entitled to an equal share of the property so exempt, and then on hand.

Thompson v. Thompson, 51 Ala. 493; Ex parte Reavis, 50 Ala. 210, Darden v. Reese, 62 Ala. 311; Tucker v. Henderson, 63 Ala. 280; Henderson v. Tucker, 70 Ala. 381; Micham v. Moore, 73 Ala. 542; Jenks v. Terrell, Ib. 238; Hunter v. Law, 68 Ala. 365; Loeb v. Richardson, 74 Ala. 311; Bell v. Hall, 76 Ala. 546; Little v. McPherson, Ib. 552; Beard v. Smith, 71 Ala. 568; Childs v. Jones, 60 Ala. 352.

2547 (2826). **Delivery of personalty exempt.**—The personal property exempted under this chapter shall be delivered to the widow, if there be one, to be by her employed or used in the maintenance of herself and minor children; or if there be no widow, then to the guardian of the minor children, to be by him employed or used in the maintenance of his wards.

ARTICLE II.

SETTING APART EXEMPTIONS TO WIDOW AND MINOR CHILDREN.

2548 (2825). **Commission to set apart personal property exempt.**—When a decedent, who was at the time of his death a resident of this state, leaves surviving him a widow and minor child or children, or either, who are bona fide residents of this state,* the probate court, at the time of appointing appraisers of the estate, shall issue a commission to them, stating the names of the widow and minor child or children, or either, as the case may be, and the nature and extent of the personal

* "Who are bona fide residents of this state," inserted by joint committee.

property exempt in their favor, and directing the appraisers to set apart the same.

2549. Duty of appraisers to set same apart; return.—The appraisers, as early as practicable, shall set apart the personal property exempt under the provisions of section 2545 (2824), having regard, as far as consistent with their duties, to the selection made by the widow, or the guardian of the minor child or children, if such selection is made; and they shall also set apart personal property to the amount of one thousand dollars in value, exempt under the provisions of section 2546 (2825), estimating it at its appraised value, and permitting the widow, or if there is no widow, or she fails to act, the guardian of the minor child or children, to select the same; and the appraisers shall return, with the inventory and appraisement, a report of the property so set apart, showing each item thereof, and its appraised value.

Ex parte Reavis, 50 Ala. 210; Thompson v. Thompson, 51 Ala. 493; David v. David, 56 Ala. 49; Leslie v. Tucker, 57 Ala. 483; Henderson v. Tucker, 70 Ala. 381; Hunter v. Law, 68 Ala. 365; Darden v. Reese, 62 Ala. 311; Tucker v. Henderson, 63 Ala. 280; Abernathy v. Bankhead, 71 Ala. 190; Totten v. Sale, 72 Ala. 488; Mitcham v. Moore, 73 Ala. 542; Loeb v. Richardson, 74 Ala. 312; Bell v. Hall, 76 Ala. 546; Little v. McPherson, 76 Ala. 552.

2550. Appraisement of homestead exemption.—The appraisers shall also appraise the homestead of the decedent, occupied by him at the time of his death, or to which he was then entitled, and they shall report the appraisement thereof when the inventory and appraisement of the personal property are returned, with a full and accurate description of the same; and, if it is a part of a tract of land exceeding in area one hundred and sixty acres, they shall also report that fact.

Pettus v. McKinney, 56 Ala. 41; Mead v. Larkin, 66 Ala. 87; Kelly v. Garrett, 67 Ala. 304; Baker v. Keith, 72 Ala. 121; Farley v. Riordon, Ib. 128; Keel v. Larkin, Ib. 493; Cochran v. Sorrell, 74 Ala. 310; Jarrell v. Payne, 75 Ala. 577.

2551. Proceedings to set apart homestead, when it exceeds value or area allowed.—When it appears from the report of the appraisers that the homestead exceeds in value two thousand dollars, or in area one hundred and sixty acres, the probate court shall forthwith appoint three commissioners, who shall, as soon as practicable, not exceeding thirty days after their appointment, set off and allot, by metes and bounds, the homestead exempt, having regard to both the quality and value of the real estate, and to the selection of the widow, or, if there is no widow, or she fails to act, of the guardian of the minor child or children, if there is such guardian, and, taking land most contiguous to the dwelling, and including the dwelling and appurtenances; and, within ten days thereafter, the commissioners shall return to the court in writing the homestead set off and allotted by them. If the homestead, after being reduced to its lowest practicable area, still exceeds two thousand dollars in value, thereby rendering it impracticable to allot and set it off, the commissioners shall report that fact to the court.

2552. Proceedings on failure of appraisers to set apart exemptions, and to appraise homestead. — If, for more than twenty days after the grant of administration, the appraisers should fail to set apart the personal property exempt in favor of the widow and minor child or children, or either, or to appraise the homestead, or to make the report in reference to the home-

stead hereinbefore required, then, upon the written application of the widow, or of the guardian of the minor child or children, the probate court shall appoint three commissioners, who shall, as soon as practicable thereafter, not exceeding thirty days, set apart the personal property exempt in the manner required of the appraisers; and, if practicable, they shall also allot and set off the homestead exemption in the manner provided in the preceding section; and, within ten days thereafter, they shall report to the court in writing the personal property set apart, with the value of each item thereof, and the homestead alloted and set off, with a full and accurate description of the same. If the homestead, after being reduced to its lowest practicable area, still exceeds two thousand dollars in value, thereby rendering it impracticable to allot and set it off, the commissioners shall report that fact.

2553. Exemption in lieu of homestead; how claimed and set apart.—When an exemption of real estate in lieu of homestead is claimed under section 2544 (2840), a petition in writing, duly verified by oath, must be filed by or on behalf of the widow and minor child or children, or either, as the case may be, in the probate court having jurisdiction of the administration of the estate, setting forth the facts authorizing such exemption, describing the real estate out of which the exemption is claimed, and stating its value; and thereupon the court shall appoint three commissioners, who shall set off and allot the same by metes and bounds; and within ten days thereafter they shall make a written report to the court of the exemption set off and allotted by them.

2554 (2841). **Exceptions to report of homestead or other exemption; day fixed for hearing, and notice thereof.**—When any homestead or other exemption has been allotted or set apart by the appraisers, or by commissioners, the personal representative, widow, minor child or children, or other person in interest, feeling aggrieved, may, within thirty days after the making of the report, file written exceptions thereto, stating the grounds of such exceptions; and thereupon the court must fix a day for the hearing of the exceptions, of which ten days' notice must be given by personal service, if the adverse parties reside in the state, or if they reside out of the state, by publication in some newspaper published in the county. If the exceptions are filed by the widow and minor child or children, or either, such notice must be served on the personal representative; but if filed by the personal representative, or other person, the notice must be served on the widow, if there be one, or if not, and the minor children are over the age of fourteen years, on them, but if they are under the age of fourteen years, then on their guardian, or if there be none, on the person having the charge or custody of them; and if there is no guardian, the court must appoint a guardian ad litem to represent such minor child or children.

2555. How issue made up and tried.—On the day fixed for the hearing of such exceptions, an issue shall be made up under the direction of the court, and the same shall be tried as other issues in that court are tried, the party excepting being the plaintiff, on whom shall rest the burden of proof; and on the hearing the court may confirm or set aside the report, as the right may appear.

2556. Proceedings when exemption of personalty excessive or insufficient.—But if the exceptions relate to the exemption of personal property, and are based on the ground that it is excessive or insufficient, the court, if the exceptions are sustained, must not set aside the report, but shall ascertain the amount of such excess or insufficiency, and, if excessive, shall order the restoration to the personal representative of property sufficient in value to cure the excess, describing the same, and enforce such order by a writ of restitution; but if insufficient, the court shall order the personal representative to deliver to the party or parties thereto entitled property sufficient to make up the deficiency; and the personal representative shall forthwith obey such order, and report to the court the property so delivered by him and its value.

2557. Proceedings when report set aside.—If the report is set aside, the court must appoint three commissioners, who shall allot and set apart such exemptions, and report the same to the court under the provisions of this article, when the same proceedings may be had as on the report first made; and so on until the exemptions are finally allowed.

2558. Costs on exceptions; against whom awarded.—If the exceptions are filed by the widow, or on behalf of the minor child or children, and are not sustained, the costs shall be taxed against the widow or the next friend of the child or children, or against both, if they joined in the exceptions; and in all other cases against the unsuccessful party.

2559 (2841). **Appeal from decree on exceptions.**—From the decree of the probate court pronounced on such exceptions, either party, feeling aggrieved, may, within twenty days, appeal to the supreme court by giving security for the costs of the appeal; or if he desires to supersede the decree, by executing bond with sufficient sureties, in such sum, and with such conditions as the probate court may prescribe.

2560. Report of appraisers as to homestead; exceptions and proceedings.—When the report of the appraisers show that the homestead does not exceed in value two thousand dollars, or in area one hundred and sixty acres, exceptions may be filed thereto by the personal representative or other person in adverse interest; and if such exceptions are filed, proceedings may be had thereon, as in case of a report, allotting or setting apart the homestead.

2561. Proceedings when no exceptions are filed.—If no exceptions are filed to the report of the appraisers under the provisions of the preceding section, or to the report allotting or setting apart any homestead or other exemption, within the time allowed for filing such exceptions, a decree must be entered confirming the report, and allowing the exemption as reported.

2562. Setting apart exemptions before administration; inventory and appraisement.—When the property, real or personal, owned by a decedent at the time of his death, does not exceed in amount and value the exemptions allowed in favor of his widow and minor child or children, or either, and no administration is granted on his estate within sixty days after his death, the probate court of the county in which he resided at the time of his death, upon the application of the widow and

Feb. 12, 1885, p. 114.

minor child or children, or either, verified by oath, and setting forth such facts, shall appoint three commissioners, who shall make and return to the court a full and complete inventory and appraisement of the real and personal property of such decedent, describing the property, and stating the value of each item or parcel thereof, and the amount of any lien or incumbrance thereon, if known, and the value of the property over and above such lien or incumbrance.*

Ib. **2563. Order of court on return of commissioners.**—If, from such inventory and appraisement, it appears that the property of the decedent, real or personal, or both, does not exceed in amount and value the exemptions allowed in such property, the court, unless good cause is shown to the contrary, shall make an order setting the same apart to the widow and minor child or children, or either, as exempt from administration; and their interest and estate in such property shall be the same as if such exemptions had been set apart after the grant of administration; but property which is incumbered shall be set apart at its value over and above the incumbrance.

Ib. **2564. Use, etc., of such property before exemptions set apart; right to sue and defend.**—Before grant of administration, and before the exempt property is set apart, the right of the widow and minor child or children, or either, to the use and benefit of such property shall be the same as if it had been set apart as exempt; and suits respecting the same may be maintained or defended by the widow, or if there is no widow, by the minor child or children, as fully, and to the same extent as if such property had been set apart as exempt from administration.

2565. Qualification and oath of commissioners.—Commissioners appointed to allot or set apart the homestead or other exemptions under this article must be disinterested householders or freeholders of the county, and, before executing their commission, must be sworn by some officer authorized to administer oaths, or by one of themselves, to faithfully discharge the duties for which they were appointed.

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* By act approved February 12, 1887 (Pamph. Acts, 1886–7, p. 112), amending section 1 of the act approved February 12, 1885, above noted, it is enacted: "That on and after the passage of this act, where any resident of this state shall die, or where any resident has heretofore died, leaving surviving him a widow, or widow and minor child or children, or minor child or children, and who, at the time of his death, owned in this state personal and real property, or either personal or real property, not to exceed the amount exempted to widows and minor child or children, as provided under the laws of this state, it shall be the duty of the probate judge of the county in which such property is situated, if there has been no administration on the estate of the decedent, and sixty days have elapsed since his death, upon the application of the widow, or if there be no widow, upon the application of some suitable person, who shall be appointed by such probate judge, as the next friend of such minor child or children, to appoint two commissioners, who shall be citizens of good standing in such county, whose duty it shall be to make a complete inventory of all the personal property so exempt, and to set apart to such widow, or widow and minor child or children, or minor child or children, all the personal and real property exempted to such widow, or widow and minor child or children, or minor child or children, under the provisions of the laws of this state. And in estimating the value of the property so owned by such decedent at the time of his death, if he left property held in pledge, or under mortgage, or other lien or incumbrance, the same shall, for the purposes of this act, be valued at only the excess of the value over and above the sum of the liens and incumbrances thereon, lawfully existing, and which had been created before decedent's death."

2566. Fees to commissioners.—Commissioners appointed under any of the provisions of this title shall be entitled to compensation for their services, at the rate of two dollars per day during the time they are actually engaged.

CHAPTER 3.

WAIVER OF EXEMPTIONS.

2567 (2846). **Right of waiver declared.**—Any person, by an instrument in writing, may waive his right to an exemption in any property exempt from levy and sale under execution or other process.

Goetter v. Pickett, 41 Ala. 387; Hearn v. State, 62 Ala. 218; Knox v. Wilson, 77 Ala. 309.

2568 (2847, 2848). **Waiver as to personalty; how made.** As to personal property, the waiver may be made by a separate instrument in writing, subscribed by the party making the same, or it may be included in any bond, bill of exchange, promissory note, or other written contract executed by him.

Neely v. Henry, 63 Ala. 261; Knox v. Wilson, 77 Ala. 309; Terrell v. Hurst, 76 Ala. 588; Wagnon v. Keenan, 77 Ala. 519; Brown v. Leitch, 60 Ala. 313.

2569 (2847, 2848). **Waiver as to homestead; how made.** As to the homestead, the waiver must be by a separate instrument in writing, subscribed by the party making the same and attested by one witness; and if such party is a married man, such waiver shall not be valid without the voluntary signature and assent of the wife, shown and acknowledged as her signature and assent to conveyances of the homestead are required to be shown and acknowledged.

Baker v. Keith, 72 Ala. 121; Terrell v. Hurst, 76 Ala. 588; Wagnon v. Keenan, 77 Ala. 519.

2570 (2849). **How waiver alleged and proved.**—In any suit, at law or in equity, in which a waiver of the right of homestead or other exemption is sought to be enforced, the fact of waiver and its extent must be averred in the complaint, petition, or bill, and by appropriate pleading may be controverted; and if such averment is sustained, the fact of waiver and its extent must be declared in the judgment or decree, and indorsed on the execution or other process issued thereon; and such waiver shall extend to the costs of the suit.

Goetter v. Pickett, 61 Ala. 387; Hearn v. State, 62 Ala. 218; Brown v. Leitch, 60 Ala. 313.

2571 (2850). **Waiver indorsed on attachment; evidence produced and affidavit filed.**—When such suit is commenced by attachment, or, in aid thereof, an ancillary attachment is sued out, the officer issuing the writ, on the plaintiff, in person, or by his agent or attorney, producing before him the written evidence of the waiver, and making and filing with him an affidavit that the exemption has been waived, must indorse on the writ the fact of such waiver and the extent thereof.

2572. Proceedings in attachment, on claim of exemptions, when waiver not sustained.—When such attachment is levied

on property embraced in a declaration of claim of exemption which has been filed for record, or subsequent to the levy a claim to such property as exempt is interposed, if, on the trial, the averment of waiver is not sustained, the levy shall be discharged and the property returned to the defendant, unless the plaintiff, within five days after judgment, shall contest the claim; and if he should desire to contest, such contest may be instituted and prosecuted as in other cases.

PART THIRD.

PROCEEDINGS IN CIVIL CASES.

TITLE I.

PROCEEDINGS IN CIVIL CASES IN COURTS OF COMMON LAW.

CHAPTER 1.—Actions and parties.
2.—Limitations of actions.
3.—The venue.
4.—The summons.
5.—The pleadings.
6.—Real actions, and action for use and occupation.
7.—The recovery of personal property in specie.
8.—Defamation.
9.—The trial and its incidents.
10.—Evidence.
11.—Amendments.
12.—Costs.
13.—Correction of errors after judgment, and prevention of abuse of process; entry of satisfaction; judgment nunc pro tunc; rehearings and new trials.
14.—Executions and forthcoming bonds.
15.—Revival of judgments and executions thereon.

CHAPTER 1.

ACTIONS AND PARTIES.

2573 (2902). **Suit by state.**—The state may sue in its own name, and is entitled to all remedies provided for the enforcement of rights between individuals, without giving bond or security, or causing affidavit to be made, though the same may be required, if the action were between private citizens; the written direction of the governor of the state to the attorney of record is a sufficient authority for bringing the suit.

Ex parte Macdonald, 76 Ala. 603.

2574 (2903). **Suit against county.**—Suit must not be brought against a county until the claim has been presented to the court of county commissioners, and disallowed or reduced by the court, and the reduction refused by the claimant.

Autauga County v. Davis, 32 Ala. 703; Marshall County v. Jackson County, 36 Ala. 613; Barbour County v. Horn, 41 Ala. 114; Dale County v. Gunter, 46 Ala.

118; Randolph County v. Hutchins, Ib. 397; Commissioners v. Rather, 48 Ala. 434; Covington County v. Dunklin, 52 Ala. 28; Shinbone v. Randolph County, 56 Ala. 183; Schroeder v. Colbert County, 66 Ala. 137.

2575 (2917). **Suit on official bonds.**—For any breach of an official bond or undertaking of any officer of this state, executor, administrator, or guardian, or of any bond or undertaking given in an official capacity to the state, or any officer thereof, the person aggrieved may sue in his own name, assigning the appropriate breach.

Amason v. Nash, 24 Ala. 279; Sprowl v. Lawrence, 33 Ala. 674; Morrow v. Wood, 56 Ala. 1; Lewis v. Lee County, 66 Ala. 480; Dudley v. Chilton County, Ib. 593.

2576 (2918). **Suit for penalty imposed by law.**—When a penalty is imposed by a statute which does not provide a mode for the recovery, any citizen may sue for the same on behalf of himself and the county in which the penalty is incurred.

2577 (2892). **When husband and wife joined.**—Husband and wife must be joined, either as plaintiffs or defendants, when the wife has an interest in the subject-matter of the suit, unless the suit relates to her separate estate, when she must sue or be sued alone.

Jordan v. Hubbard, 26 Ala. 433; Gerald v. McKenzie, 27 Ala. 166; Friend v. Oliver, Ib. 532; Pickens v. Oliver, 29 Ala. 528; Cannon v. Turner, 32 Ala. 483; Hutton v. Williams, 35 Ala. 503; Milton v. Haden, 32 Ala. 30; Spear v. Lumpkin, 39 Ala. 600; Campbell v. Campbell, Ib. 312; Parish v. Balkum, 40 Ala. 285; Carter v. Owens, 41 Ala. 217; Becton v. Selleck, 48 Ala. 226; Lyles v. Clements, 49 445; Pitts v. Powledge, 56 Ala. 147; Betts v. Mullin, 62 Ala. 365; Boggs v. Price, 64 Ala. 514; King v. Martin, 67 Ala. 177; Hurst v. Thompson, 68 Ala. 560; Mahon v. Tatum, 69 Ala. 466; Sawyers v. Baker, 72 Ala. 49; Sims v. Nat. Bank, 73 Ala. 248; Bush v. Garner, Ib. 162; Williamson v. Baker, 78 Ala. 590; Skinner v. Chapman, Ib. 376.

2578 (2901). **When wife may sue or defend for husband.** When a husband or father has deserted his family, or is confined in an insane asylum, not having been declared of unsound mind, or when he is imprisoned for a term of two years or more under a conviction for crime, the wife or mother may prosecute and defend in his name any action which he might have prosecuted or defended, and has the same powers and rights in reference to such action which he might have had.

Ex parte Cole, 28 Ala. 50.

2579 (2893). **Suit by and against infants.**—Infants must sue by next friend, and must be defended by a guardian of the appointment of the court.

Cook v. Adams, 27 Ala. 294.

2580 (2894). **Suit by and against persons of unsound mind.** Persons of unsound mind suing for a personal injury, not having a guardian appointed in this state, may sue by next friend, and if sued, must be defended by a guardian of the appointment of the court.

Walker v. Clay, 21 Ala. 797.

2581 (2895). **Guardian appointed pending suit.**—If the suit be not for a personal injury to the ward, whether the ward be a minor, or a person of unsound mind, on the appointment of a guardian pending suit, such guardian may, on application, be substituted for the next friend, and the suit must proceed in the name of the guardian for the use of the ward.

2582 (2893). **Guardian may sue for the use of the ward.** In all suits in which the ward has an interest, and the recovery enures to his or her benefit, a guardian may sue in his own name for the use of the ward; and if, pending such suit, the ward should arrive at full age, or, if a female, should marry, or, if a person of unsound mind, should be restored to sanity, the suit must proceed in his or her name; or, if the ward should die, his or her personal representative may be made the sole party plaintiff, or, if the nature of the case require it, his or her heirs may be made parties plaintiff.

Hutton v. Williams, 35 Ala. 503; Longmire v. Pilkington, 37 Ala. 296; Blackman v. Davis, 42 Ala. 184.

2583 (2795). **Guardians of persons of unsound mind subject to suit.**—The guardian of a person of unsound mind may be sued on any contract made by the ward, or for any tort committed by him while of sound mind, or for necessaries furnished him or his family before the appointment of a guardian.

Weems v. Weems, 73 Ala. 462.

2584 (2900). **Action for felonious injury.**—For any injury, either to person or property, amounting to a felony, a civil action may be maintained by the party injured, without a prosecution of the offender.

2585 (2896). **Unmarried woman may sue for her seduction.**—An unmarried female may prosecute as plaintiff an action for her own seduction, and may recover such damages as may be assessed in her favor.

2586 (2897). **Suit for seduction of daughter by father or mother.**—The father, or in case of his death, or desertion of his family, or of his imprisonment for a term of two years or more, under a conviction for crime or of his confinement in an insane asylum, or of his having been declared of unsound mind, the mother may maintain an action for the seduction of a daughter, though she be not living with, or in the service of the plaintiff at the time of the seduction, or afterwards, and there be no loss of service; but a suit by the daughter is a bar to an action by the father or mother.

2587 (2898). **Father may sue for injury to minor child.** A father, or in case of his death or desertion of his family, or of his imprisonment for a term of two years or more under a conviction for crime, or of his confinement in an insane asylum, or if he has been declared of unsound mind, the mother may sue for an injury to a minor child, a member of the family.

2588. Suits for injuries causing death of minor child. Jan. 23, 1885, p. 39. When the death of a minor child is caused by the wrongful act, or omission, or negligence of any person or persons, or corporation, his or their servants or agents, the father, or the mother, in the cases mentioned in the preceding section, or the personal representative of such minor, may sue and recover such damages as the jury may assess; but a suit by the father or mother, in such case, is a bar to a suit by the personal representative.

2589 (2641, 2642, 2643). **Action for wrongful act, omission, or negligence causing death.**—A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents,

whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate.

Savannah & Memphis R. R. Co. v. Shearer, 58 Ala. 672; Mobile & Montgomery R. R. Co. v. Blakely, 59 Ala. 471; Tanner v. Louisville & Nashville R. R. Co., 60 Ala. 621; Memphis & Charleston R. R. Co. v. Copeland, 61 Ala. 376; Cook v. Central R. R. & B. Co., 67 Ala. 533; Gothard v. Alabama Great Southern R. R. Co., Ib. 114; Lankford v. Barrett, 29 Ala. 700.

Feb. 12, 1885, p. 115.

2590. Liability of master or employer to servant or employe for injuries.—When a personal injury is received by a servant or employe in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employe, as if he were a stranger, and not engaged in such service or employment, in the cases following:

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employe, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section, if the servant or employe knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the

master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition.

2591. Personal representative may sue, if injury results in death.—If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions. Ib.

2592. Damages exempt.—Damages recovered by the servant or employe, of and from the master or employer, are not subject to the payment of debts, or any legal liabilities incurred by him. Ib.

2593. Liability of personal representative and sureties. The personal representative, and the sureties on his bond are liable to the parties in interest for the due and legal distribution of all damages recovered by such representative under section 2588, or section 2589, or section 2591, and are subject to all remedies which may be pursued against such representative and sureties for the due administration of personal assets.

2594 (2890). **When beneficial owner must sue.**—Actions on promissory notes, bonds, or other contracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not, subject to any defense the payor, obligor, or debtor may have had against the payee, obligee, or creditor, previous to notice of assignment or transfer, except that, in actions upon bills of exchange and promissory notes payable at a bank or banking house, or at a designated place, and other commercial instruments, the suit must be instituted in the name of the person having the legal title.

Judgments not contracts within the statute.—Smith v. Harrison, 33 Ala. 706; Johnson v. Martin, 54 Ala. 271; Masterson v Gibson, 56 Ala. 56; Wolffe v. Eberlein, 74 Ala. 99. **Nor official bond of county treasurer.**—Morrow v. Wood, 56 Ala. 1. **Nor bond for title to lands.**—Skinner v. Bedell, 32 Ala. 44. **Nor a promise to pay cotton.**—Auerbach v. Pritchett, 58 Ala. 451. **Nor warranty of soundness of slave.** Newsom v. Huey, 36 Ala. 37. **Nor replevin bond in attachment,** when erroneously made payable to officer making the levy.—Agnew v. Leath, 63 Ala. 345. **Nor receipt by maker of promissory note,** containing promise to return or account for it to the person from whom he received it.—Henley v. Bush, 33 Ala. 636. **Nor contract with telegraph company for transmission of message.**—Daugherty v. American U. Tel. Co., 75 Ala. 179. **Ejectment not within the statute.**—Dane v. Glenncr, 72 Ala. 160. **Policy of insurance is a contract for payment of money.**—Perry v. Merchants Ins. Co., 25 Ala. 355. **When bill of exchange within the statute.**—Ala. Mining Co. v. Brainard, 35 Ala. 476. **Receiver in chancery is the "party really interested,"** under facts of this case.—Leonard v. Storrs, 31 Ala. 488. **Also a distributee of an estate, as to note allotted to him.**—Carter v. Owens, 41 Ala. 217. **Also a county superintendent of education,** as to notes made payable to township trustees.—Yerby v. Sexton, 48 Ala. 311. **Also transferee of lost note or bond.** Glassell v. Mason, 32 Ala. 719. **Also a substituted contractor,** under facts of this case.—Pensacola R. R. Co. v. Scaffer, 76 Ala. 233. **Also a married woman,** as to note for corpus of her property taken in the name of her husband.—Grantham v. Payne, 77 Ala. 584. **When assignee of a policy of insurance cannot maintain suit.** Fire Ins. Co. v. Felrath, 77 Ala. 194. **When debtor places notes in hands of another,** the proceeds to be paid over to his creditors, the debtor may sue in his own name for breach of the contract.—Shotwell v. Gilkey, 31 Ala. 724. **When promise made to one person for benefit of another,** either may sue.—Ib. **When sole legatee not within the statute.**—Wood v. Cosby, 76 Ala. 557. **Statute does not apply to suits in equity.**—Dawson v. Burrus, 73 Ala. 111. **When agent may sue.**—Bryant v. Wilson, 27 Ala. 208. **Averments of ownership.**—Dwyer v. Kennemore, 31 Ala. 404; Bryant v. Wilson, 27 Ala. 208. **Plea averring that plaintiff is not beneficial owner, good.**—Bryant v. Wilson, 27 Ala. 208. **"Party really interested," discussed.** Yerby v. Sexton, 48 Ala. 311.

2595 (2891). **Beneficiary sole party on record.**—In all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record.

2596 (2909). **Action not abated by death of nominal plaintiff.**—When suit is brought for the use of another, the death of the nominal plaintiff does not abate the suit, but it proceeds in the name of the beneficiary; when the beneficiary dies, it must be revived in the name of his personal representative, whether the nominal plaintiff be living or not.

2597 (2915). **Suits on lost notes, etc.; exception.**—Suit may be brought on a bond, note, bill of exchange, or other mercantile instrument, which has been lost or destroyed by accident; and if affidavit is made by the plaintiff of such loss and destruction, and the contents thereof, and that the same has not been paid or otherwise discharged, and accompanies the complaint, it must be received as presumptive evidence, both of the contents and loss or destruction of such instrument, unless the defendant by plea, verified by affidavit, denies the execution of such bond, note, or bill, or the indorsement, acceptance, or the contents thereof, in which case proof of such execution, indorsement, acceptance, or contents must be made by the plaintiff; but this section must not be so construed as to authorize a suit for the recovery of bank notes, or bills issued to circulate as money, and alleged to be lost or destroyed. When the suit is against an executor or administrator, he may controvert the oath of the plaintiff of the loss, destruction, or contents of the instrument sued on, by swearing to the best of his knowledge and belief.

Boylston v. Sherran, 31 Ala. 538; Glassell v. Mason, 32 Ala. 719; Bank v. Meagher, 33 Ala. 622; Branch Bank v. Tillman, 12 Ala. 214; Posey v. Decatur Bank, Ib. 802; Bank v. Williams, 13 Ala. 544.

2598 (2916). **Execution not to issue in such case till bond given.**—When suit is brought under the provisions of the preceding section, to recover upon a bill of exchange or other instrument, which, by the provisions of this Code, is declared subject to the law-merchant, and alleged to have been lost or destroyed before the maturity thereof, no execution must issue on the judgment until the plaintiff execute bond payable to the defendant, with surety, in twice the amount of the recovery, with condition to pay all such damages as he may sustain by reason of the judgment and the payment thereof.

2599 (2922). **When ratable recovery on contract allowed.** When a person contracts for the performance of services by himself for a stipulated period of time, and is prevented from full performance of the contract by death, his personal representative may recover a ratable compensation for the service actually rendered, notwithstanding the entirety of the contract.

Dryer v. Lewis, 57 Ala. 551.

2600 (2920). **Actions survive to and against representative.**—All actions on contracts, express or implied, all personal actions, except for injuries to the person or reputation, survive in favor of and against the personal representatives.

Hadley v. Bryars, 58 Ala. 185; Garrison v. Burden, 40 Ala. 513. See, also, citations to section 2603.

2601 (2921). **Real actions survive to or against heir or representative.**—Real actions to try the title, or for the recov-

ery of the possession of lands, and actions for injuries to lands, survive in favor of heirs, devisees, or personal representatives, and against heirs, devisees, tenants, or personal representatives, according to their respective rights; and the court must direct the record and judgment to be so framed as to secure their rights and declare their respective interests.

Ex parte Swan, 23 Ala. 193; Crutchfield v. Hudson, Ib. 393; Mason v. Storrs, 34 Ala. 179; Ridgeway v. Waugh, 51 Ala. 423; Evans v. Welch, 63 Ala. 250; Ex parte Sayre, 69 Ala. 184.

2602 (2914). **Action by or against woman not abated by marriage.**—A suit brought by or against an unmarried woman does not abate on her marriage, but, the marriage being suggested upon the record, the suit proceeds in her name acquired by the marriage, and judgment is rendered accordingly. If judgment be rendered against her, it may be satisfied out of her separate estate.

2603 (2908). **When actions do not abate by death; revivor in eighteen months.**—No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within eighteen months thereafter, be revived in the name of or against the legal representative of the deceased, his successor, or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor.

Bebee v. Miller, Minor, 364; Gayle v. Agee, 4 Port. 507; Gregg v. Bethea, 6 Port. 9; Branch Bank v. McDonald, 22 Ala. 474; Sherrod v. Hampton, 25 Ala. 652; Rupert v. Elston, 35 Ala. 79; Foster v. Chamberlain, 41 Ala. 158; Dumas v. Robbins, 48 Ala. 545; Ex parte Ware, Ib. 223; Waller v. Nelson, Ib. 223; Ex parte Kirtland, Ib. 403; Ex parte Jones, 54 Ala. 108; Pope v. Irby, 57 Ala. 105; Brown v. Tutwiler, 61 Ala. 372; Glenn v. Billingslea, 64 Ala. 346; Evans v. Welch, 63 Ala. 250; Ex parte Sayre, 69 Ala. 184.

2604 (2905). **Joint promises in writing; how construed.** When two or more persons are jointly bound by judgment, bond, covenant, or promise in writing of any description whatsoever, the obligation or promise is in law several as well as joint, and suit may be instituted thereon against the legal representatives of such as are dead.

Duramus v. Harrison, 26 Ala. 326; Cox v. Harris, 48 Ala. 538; McKee v. Griffin, 60 Ala. 427; Haralson v. Campbell, 63 Ala. 278; Burns v. Moore, 76 Ala. 339.

2605 (2904). **Suits against partnership by firm name, or against one partner.**—Two or more persons associated together as partners in any business or pursuit, who transact business under a common name, whether it comprise the names of such persons or not, may be sued by their common name, and the summons in such case being served on one or more of the associates, the judgment in the action binds the joint property of all the associates in the same manner as if all had been named defendants, had been sued upon their joint liability, and served with process; any one of the associates, or his legal representative, may also be sued for the obligation of all.

Suit against partners by common name.—Wyman v. Stewart, 42 Ala. 163; Cox v. Harris, 48 Ala. 538; McCoy v. Watson, 51 Ala. 466; Haralson v. Campbell, 63 Ala. 278; Watts v. Rice, 75 Ala. 289; Yarbrough v. Bush, 69 Ala. 170; Ladiga v. Smith, 78 Ala. 108. **Does not authorize suit by partners in firm name.**—Lanford v. Patton, 44 Ala. 584; Moore v. Burns, 60 Ala. 269. **One sued for obligation of all.**—McCullough v. Judd, 20 Ala. 703; Duramus v. Harrison, 26 Ala. 326; Wald-

ron v. Simmons, 28 Ala. 629; Ex parte Ware, 48 Ala. 223; Pearce v. Shorter, 50 Ala. 318; Hall v. Cook, 69 Ala. 87; Hall v. Green, Ib. 368. **When suit against individual members of firm.**—Leinkauff v. Munter, 76 Ala. 194. **Effect of acceptance of service by one partner.**—Bowin v. Sutherlin, 44 Ala. 278. **Statute does not relate to suits in equity.**—Opelika v. Daniel, 59 Ala. 211.

2606 (2910). **Revivor on death of defendant pending suit.** If the cause of action survive, on the death of a defendant, suggestion thereof must be made and entered of record, and the proper representative may come in and voluntarily make himself a party defendant; but if such representative do not come in and make himself a party, citation must issue to him, on his being made known, to appear at the next term and defend, and after service of such citation, the suit may be revived against him; but final judgment must not be rendered against a personal representative, if he objects, until after the expiration of eighteen months from the grant of letters testamentary or of administration.

Waddill v. John, 48 Ala. 232.

2607 (2911). **Discontinuance entered as to parties not served, or alias issued.**—When any suit is instituted against two or more persons upon any joint or joint and several contract, or upon any joint or joint and several cause of action, the plaintiff may, at his election, sue out an alias summons, or discontinue as to those on whom the summons is not served, and proceed to judgment against those on whom it has been executed.

Curtis v. Gaines, 46 Ala. 455; Slade v. Street, 77 Ala. 576. See, also, on subject of discontinuances, Whitaker v. VanHorn, 43 Ala. 255; Garrett v. Lynch, 44 Ala. 324; Mock v. Walker, 42 Ala. 668; Curtis v. Gaines, 46 Ala. 455; Reynolds v. Simpkins, 67 Ala. 378

2608 (2912, 2913). **Death of one of several joint defendants.** The death of one or more defendants jointly sued does not, as to the defendant dying, abate the suit, if the cause of action survive, but may be revived against the proper representative of such defendant, and may proceed against such representative and the surviving defendant or defendants, jointly or severally, at the election of the plaintiff; the judgments therein rendered must be several, but against a personal representative, if he objects, judgment must not be rendered until after the expiration of eighteen months from the grant of letters testamentary or of administration; the satisfaction of one judgment is, as to the plaintiff, a satisfaction of all, except as to costs; but if requested, the plaintiff must assign, without recourse on him, the judgment against a principal debtor to the party from whom satisfaction is received, if such principal debtor was bound to the indemnity of such party.

Garrett v. Lynch, 44 Ala. 324; Parker v. Abrams, 50 Ala. 35; Gilbreath v. Jones, 66 Ala. 29.

2609 (2919). **Plaintiff suing several; liability for costs.** When a suit is instituted against several defendants, whether sued as partners or otherwise, the plaintiff may recover against one or more, but is liable to costs to those against whom he does not obtain judgment.

Walker v. Mobile Dock Co., 31 Ala. 531; Steed v. Barnhill, 71 Ala. 157; Burns v. Moore, 76 Ala. 339.

2610 (2906, 2907). **Suggestion of claim of third party; when can be made; notice and proceedings.**—A defendant

against whom an action is pending upon any contract for the payment of money may, at any time before issue joined, make affidavit that a person not a party to the suit, without collusion with him, claims the money in controversy, and deposit the money in court, praying an order that such person be required, on notice, to come in and defend; and thereupon, if such person do not voluntarily come in and make himself a party defendant, the court must, if he reside within the state, order a summons to issue to him to appear at the next term and make himself a party defendant, of which service must be made for at least ten days before the return day; or if he reside without the state, order notice to him by publication for three successive weeks, in some newspaper published in the county, or if there be no such paper, in a newspaper nearest to the county; and after such notice has been given, the court may make an order that such person be substituted as a party to the suit in place of the defendant, and thereupon such person stands in the place of the defendant, and the latter is discharged from liability to the plaintiff and substituted defendant for the money sought to be recovered of him.

Nelson v. Goree, 34 Ala. 565.

March 1, 1881, p. 121.

2611. When defendant in detinue may require adverse claimant to come in and defend.—The defendant in an action for the recovery of chattels in specie, not claiming title, may, at any time before issue joined, make affidavit that a person not a party to the suit, without collusion with him, claims the chattels, or a part thereof, and pray an order that such person be required, on notice, to come in and defend; and thereupon, if such person do not voluntarily come in and make himself a party defendant, the court must, if he resides within the state, order a summons to issue to him to appear at the next term and make himself a party defendant, of which service must be made for at least ten days before the return day; or if he resides without the state, order notice to him, by publication for three successive weeks in some newspaper published in the county, or, if there be no such paper, in a newspaper published nearest to the county. If such person appears and makes himself a party defendant, the defendant may be discharged; and if the defendant has retained possession of the chattels, giving bond, the court may order the chattels to be delivered to such person, on his giving bond with sufficient surety, to be approved by the clerk, payable to the plaintiff, in the penalty of the bond of the defendant, with condition that if he is cast in the suit he will, within twenty days thereafter, deliver the chattels and pay all such damages as may be assessed for the detention thereof, and all costs adjudged against him. If such person refuse or neglect for three days after being made a party defendant to give such bond, the chattels must be delivered to the plaintiff, on his giving bond with sufficient surety, to be approved by the clerk, payable to such person, in the penalty of the bond of the defendant, and with like condition; on the execution and approval of either bond, the bond of the defendant is discharged and must be canceled. The bonds taken under this section, on breach of the condition thereof, and on the return of the sheriff, as in the case of bonds taken from plaintiff or defendant in other

actions for the recovery of chattels in specie, have the force and effect of judgments, on which execution may issue against all or any of the obligors. If such person, on notice, does not come in and defend, the judgment rendered in the action bars him from maintaining any action against plaintiff or defendant for the chattels, or the taking, or conversion, or detention thereof. If the plaintiff fail to give bond as provided in this section, the chattels must be delivered to the defendant.

Powell v. Ledyard, 76 Ala. 423.

CHAPTER 2.

LIMITATION OF ACTIONS.

ARTICLE 1.—Time in which suits must be brought.

2.—General rules.

ARTICLE I.

TIME IN WHICH SUITS MUST BE BROUGHT.

2612 (3223). **Limitation of actions.**—Civil suits must be commenced, after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards.

The statute does not annul contracts or extinguish debts; it merely bars the remedies specified.—Ware v. Curry, 67 Ala. 274; Molton v. Henderson, 62 Ala. 426; Towns v. Bardwell, 1 Stew. & Port. 36; Crawford v. Childress, 1 Ala. 482; Jones v. Jones, 18 Ala. 248. **One remedy may be barred without affecting others.** Ware v. Curry, 67 Ala. 274. **As to property, the statute operates on the title,** defeating that of the true owner, and vesting it in the adverse possessor.—Molton v. Henderson, 62 Ala. 426; Brown v. Brown, 5 Ala. 508; Doyle v. Bouler, 7 Ala. 246; Howell v. Hair, 15 Ala. 194; Newcombe v. Leavitt, 22 Ala. 631; Lay v. Lawson, 23 Ala. 377; Jones v. Jones, 18 Ala. 248; Farmer v. Eslava, 11 Ala. 1028; Burks v. Mitchell, 78 Ala. 61; Alexander v. Wheeler, Ib. 167; Beard v. Ryan, Ib. 37; State v. Conner, 69 Ala. 212; Vandiveer v. Stickney, 75 Ala. 225; Morgan v. Casey, 73 Ala. 222; Dothard v. Denson, 72 Ala. 541; Walker v. Crawford, 70 Ala. 567; Wilson v. Glenn, 68 Ala. 383; Ryan v. Kilpatrick, 66 Ala. 332; Clark v. Snodgrass, Ib. 233; Barclay v. Smith, Ib. 230. **The statute does not begin to run against express, continuing trusts,** until there has been a repudiation of the trust, and that fact brought to the knowledge of the beneficiary.—McCarthy v. McCarthy, 74 Ala. 546; Whetstone v. Whetstone, 75 Ala. 496; Hastie v. Aiken, 67 Ala. 313; Maury v. Mason, 8 Port. 211; Causler v. Wharton, 62 Ala. 359; Harrison v. Heflin, 54 Ala. 533; Wood v. Wood, 3 Ala. 756; Pinston v. Brewster, 14 Ala. 315; Colbert v. Daniel, 32 Ala. 314; Blackwell v. Blackwell, 33 Ala. 57. **But implied or constructive trusts are within the statute.**—Maury v. Mason, 8 Port. 211; Wood v. Wood, 3 Ala. 756; Kimbro v. Waller, 21 Ala. 376; Tarleton v. Goldthwaite, 23 Ala. 346; Martin v. Branch Bank, 31 Ala. 115; Lockard v. Nash, 64 Ala. 385; Nettles v. Nettles, 67 Ala. 599. **The bar of the statute, when complete against trustee, also operates a bar against beneficiary.**—Colburn v. Broughton, 9 Ala. 351; Bryan v. Weems, 29 Ala. 423; Fleming v. Gilmer, 35 Ala. 62; Love v. Love, 65 Ala. 554; Molton v. Henderson, 62 Ala. 426. **Does not run against the state.** Wright v. Swan, 6 Port. 84; Kennedy v. Townsley, 16 Ala. 239; Iverson v. Dubose, 27 Ala. 418; Ware v. Greene, 37 Ala. 494; Swann v. Lindsey, 70 Ala. 507. **But it runs against political subdivisions of the state.**—Miller v. State, 38 Ala. 600. **And against grantee of the government.**—Dillingham v. Brown, 38 Ala. 311. **Also against the state when a mere trustee.**—Miller v. State, 38 Ala. 600; Molton v. Henderson, 62 Ala. 426. **When statute begins to run.**—Generally, not until there is some one entitled to sue, and some one against whom suit may be brought. Baker v. Barclift, 76 Ala. 414; Swann v. Lindsey, 70 Ala. 507; Underhill v. Mobile Ins. Co., 67 Ala. 45; Wyatt v. Rambo, 29 Ala. 510; Lawson v. Lay, 24 Ala. 184; Hopper v. Steele, 18 Ala. 828; Bohannon v. Chapman, 17 Ala. 696; Johnson v. Wren, 3 Stew. 172. When it begins to run between guardian and ward.—Taylor v. Kilgore, 33 Ala. 214; Alston v. Alston, 34 Ala. 15; Garrett v. Garrett, 69 Ala. 429. In favor of sureties on bond of personal representative.—Bonner v. Young,

68 Ala. 35; Adams v. Jones, Ib. 117; Wright v. Long, 66 Ala. 389; Jones v. Ritter, 56 Ala. 270; Fretwell v. McLemore, 52 Ala. 124. In other cases.—Boyd v. Beck, 29 Ala. 703; Snedicor v. Davis, 17 Ala. 72; Owen v. Henderson, 7 Ala. 641; Lawson v. Lay, 24 Ala. 184; Wyatt v. Rambo, 29 Ala. 510; Harold v. Weaver, 72 Ala. 373; Powell v. Jones, Ib. 392; Pugh v. Youngblood, 69 Ala. 296; Underhill v. Mobile Ins. Co., 67 Ala. 45; Wright v. Paine, 62 Ala. 340; Molton v. Henderson, Ib. 426; Gilbert v. Pinson, 57 Ala. 35; Curry v. Woodward, 53 Ala. 371; Montgomery v. Gordon, 51 Ala. 377; Baker v. Barclift, 76 Ala. 414. **Computation of time.**—Owen v. Slatter, 26 Ala. 547; Garner v. Johnson, 22 Ala. 494; Beard v. Ryan, 78 Ala. 37; Allen v. Elliott, 67 Ala. 432. **Vendor's lien as affected by the statute.**—Driver v. Hudspeth, 16 Ala. 348; Relfe v. Relfe, 34 Ala. 500; Bizzell v. Nix, 60 Ala. 281; Shorter v. Frazer, 64 Ala. 74; Chapman v. Lee, Ib. 483; Ware v. Curry, 67 Ala. 274; Flinn v. Barber, 61 Ala. 530. **Other liens.**—Cullum v. Branch Bank, 23 Ala. 798. **Statute runs in favor of mortgagee in possession against mortgagor.**—McCoy v. Gentry, 73 Ala. 105. **Provisions never strictly construed.**—Martin v. Tally, 72 Ala. 24. **Personal representative cannot affect running of statute in favor of heirs.**—Lee v. Downey, 68 Ala. 98; Scott v. Ware, 64 Ala. 174; Steele v. Steele, Ib. 438; Pollard v. Scears, 28 Ala. 484. **All exceptions specified in statute,** and courts have no power to add to them.—Barclay v. Smith, 66 Ala. 230; Howell v. Hair, 15 Ala. 194. **Courts of chancery give effect to exceptions.**—Crocker v. Clements, 23 Ala. 296. **Ignorance without fraud will not avoid bar.**—Martin v. Branch Bank, 31 Ala. 115; Underhill v. Mobile Ins. Co., 67 Ala. 45. **Disabilities; discussion of.**—Riggs v. Fuller, 54 Ala. 142. **Statute having commenced to run, not suspended by intervening disabilities.**—Caldwell v. Thorpe, 8 Ala. 253; Branch Bank v. Donelson, 12 Ala. 741; Lowe v. Jones, 15 Ala. 545. **When note not withdrawn from statute.**—Lyon v. State Bank, 12 Ala. 508. **Cestuis que trust cannot set up statute against each other,** unless the trustee could make same defense against them.—Hastie v. Aiken, 67 Ala 313. **What law governs.**—Daniel v. Day, 51 Ala. 431. **Bankrupt limitation of two years; when not applicable.**—Steele v. Moody, 53 Ala. 418. **When will does not create trust in land** in favor of creditor, so as to take debt out of the bar of the statute.—Steele v. Steele, 64 Ala. 438. **Personal representative cannot invoke bar in favor of sureties,** in suit against him to compel settlement.—Greenlee v. Greenlee, 62 Ala. 330. **Rule of repose.**—Nettles v. Nettles, 67 Ala. 599; Barksdale v. Garrett, 64 Ala. 277; Greenlee v. Greenlee, 62 Ala. 330; Jones v. Brevard, 59 Ala. 499; Goodwyn v. Baldwin, 57 Ala. 127; Dawson v. Hoyle, 58 Ala. 44; Boulo v. N. O. R. R. Co., 55 Ala. 480; Harrison v. Heflin 54 Ala. 533. **Statute suspended during late war.** Carter v. Carter, 53 Ala. 365; Anderson v. Melear, 56 Ala. 621; Steele v. Steele, 64 Ala. 438; Allen v. Elliott. 67 Ala. 432; Morgan v. Casey, 73 Ala. 222. **But not the rule of repose.**—Harrison v. Heflin, 54 Ala. 552; Garrett v. Garrett, 69 Ala. 429. **Statute must be specially pleaded.**—Bolling v. Jones, 67 Ala. 508; Parker v. Jones, Ib. 234. **At law asserted by plea, not by demurrer.**—Huss v. Central R. R. Co., 66 Ala. 473. **But in equity may be asserted by plea, demurrer, or answer.** Thompson v. Parker, 68 Ala. 387; Ragland v. Morton, 41 Ala. 344; Underhill v. Mobile Ins. Co., 67 Ala. 45; Bercy v. Lavretta, 63 Ala. 374; Espy v. Comer, 76 Ala. 501. **When well pleaded in equity.**—Love v. Love, 65 Ala. 554. **In detinue, may be given in evidence under general issue.**—Lay v. Lawson, 23 Ala. 377; Traun v. Keiffer, 31 Ala. 136. **Computation of time as against amended complaint.** Dowling v. Blackman, 70 Ala. 303; Ricketts v. Weaver, 64 Ala. 548; Stringer v. Waters, 63 Ala. 361; Lansford v. Scott, 51 Ala. 557; Mohr v. Lemle, 69 Ala. 180. **Defense of statute must be met in equity by amendment to bill.**—Parker v. Jones, 67 Ala. 234; Ragland v. Moore, 41 Ala. 344.

2613 (3224). **Limitation of twenty years.**—Within twenty years,—

1. Actions at the suit of the state against a citizen thereof, for the recovery of real or personal property.

2. Actions by or for the use of any township, for the recovery of sixteenth section or other school lands belonging to the township.

3. Actions upon a judgment or decree of any court of this state, of the United States, or of any state or territory of the United States.

2614 (3225). **Limitation of ten years.**—Within ten years,—

1. Actions founded upon any contract or writing under seal.

2. Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, except as herein otherwise provided.

3. Motions and other actions against sheriffs, coroners, con-

stables, and other public officers, for non-feasance, misfeasance, or malfeasance in office.

Contract under seal.—Cotton v. Cotton, 75 Ala. 345. **Recovery of lands; generally.**—Doe v. Eslava 11 Ala. 1030; Rawls v. Doe, 23 Ala. 240; Owen v. Slatter, 26 Ala. 547; Ivey v. Blum, 53 Ala. 172; Coker v. Ferguson, 70 Ala. 284; Beard v. Ryan, 78 Ala. 37; Burks v. Mitchell, Ib. 61. **Adverse possession; what is.**—Clark v. Snodgrass, 66 Ala. 233; Lipscomp v. McClellan, 72 Ala. 151; Dothard v. Denson, Ib. 541; Alexander v. Wheeler, 78 Ala. 167; Elliott v. Dycke, Ib. 150; Molton v. Henderson. 62 Ala. 426; Alexander v. Wheeler, 69 Ala. 332. **Color of title not necessary.**—Herbert v. Hanrick, 16 Ala. 581; Ladd v. Dubroca, 61 Ala. 25; Barclay v. Smith, 66 Ala. 230; Smith v. Roberts, 62 Ala. 83. **Nor good faith.**—Smith v. Roberts, 62 Ala. 83; State v. Conner, 69 Ala. 212. **Not necessary that title should be good, or believed to be good.**—Baucum v. George 65 Ala. 259; Dothard v. Denson, 72 Ala. 541. **Under parol gift.**—Collins v. Johnson. 57 Ala. 304; Boykin v. Smith, 65 Ala. 294; Vandiveer v. Stickney, 75 Ala. 225; Alexander v. Wheeler, 78 Ala. 167. **Between mortgagor and mortgagee.**—Boyd v. Beck, 27 Ala. 703; Coyle v. Williams, 57 Ala. 108; Elsberry v. Boykin, 65 Ala. 336; State v. Conner, 69 Ala. 212. **Between principal and agent.**—Baucum v. George, 65 Ala. 259. **Between vendor and vendee.**—Relfe v. Relfe, 34 Ala. 500; McQueen v. Ivey, 36 Ala. 308; Ormond v. Martin, 37 Ala. 598; Boykin v. Smith, 65 Ala. 294; Potts v. Coleman, 67 Ala. 221; Casey v. Morgan, Ib. 441; Tillman v. Spann, 68 Ala. 102; State v. Conner, 69 Ala. 212; Walker v. Crawford, 70 Ala. 567; Morgan v. Casey, 73 Ala. 222; Beard v. Ryan, 78 Ala. 37. **Between original vendor and sub-purchaser.**—Walker v. Crawford, 70 Ala. 567; Beard v. Ryan, 78 Ala. 37. **Between tenants in common.**—Brady v. Huff, 75 Ala. 80. **Fraudulent deed will not uphold.** Jones v. Wilson, 69 Ala. 400; Williams v. Higgins, Ib. 517. **But voluntary conveyance will.**—Snedicor v. Watkins, 71 Ala. 48. **Possession under color of title; extent of.**—Baucum v. George, 65 Ala. 259; Ryan v. Kilpatrick, 66 Ala. 332; Stovall v. Fowler, 72 Ala. 77. **Extent of, when not under color of title.**—Ryan v. Kilpatrick, 66 Ala. 332; Burks v. Mitchell, 78 Ala. 61. **Continuity of possession.** Haden v. Ivey, 51 Ala. 381; Riggs v. Fuller, 54 Ala. 141; Ladd v. Dubroca, 61 Ala. 25; Wilson v. Glenn, 68 Ala. 383; Humes v. Bernstein, 72 Ala. 546; Mills v. Clayton, 73 Ala. 359; Beard v. Ryan, 78 Ala. 37; Farmer v. Eslava, 11 Ala. 1030; Brady v. Huff, 75 Ala. 80. **When statute good defense in favor of heirs against personal representative.**—Lee v. Downey, 68 Ala. 98. **Application in courts of equity.**—Harold v. Weaver, 72 Ala. 373; Ninninger v. Norwood, 72 Ala. 277; Love v. Love, 65 Ala. 554; Clark v. Snodgrass, 66 Ala. 233; McCoy v. Gentry, 73 Ala. 105; Trimble v. Fariss, 78 Ala. 260; Cotton v. Cotton, 75 Ala. 345.

2615 (3226). **Limitation of six years.**—Within six years,—

1. Actions for any trespass to person or liberty, such as false imprisonment or assault and battery.

2. Actions for any trespass to real or personal property.

3. Actions for the detention or conversion of personal property.

4. Actions founded on a promise in writing not under seal.

5. Actions for the recovery of money upon a loan, upon a stated or liquidated account, or for arrears of rent due upon a parol demise.

6. Actions for the use and occupation of land.

7. Motions and other actions against the sureties of any sheriff, coroner, constable, or any public officer, or actions against the sureties of executors, administrators, or guardians, for any misfeasance or malfeasance whatever of their principal; the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety.

8. Motions and other actions against attorneys at law, for failure to pay over money of their clients, or for neglect or omission of duty.

9. Actions founded upon judgments obtained before justices of the peace of this state.

10. Actions upon any simple contract or specialty, not herein specifically enumerated.

Subdivision 3.—Johnson v. Wren, 3 Stew. 172; Maury v. Mason. 8 Port. 211; Powell v. Wragg, 13 Ala. 161; Bohannon v. Chapman, 17 Ala. 696; Benje v.

Creagh, 21 Ala. 151; Bryan v. Weems, 29 Ala. 423; Manly v. Turnipseed, 37 Ala. 522; Bell v. Nichols, 38 Ala. 678; Lockard v. Nash, 64 Ala. 385; Underhill v. Mobile Ins. Co., 67 Ala. 45; Sullivan v. Lawler, 72 Ala. 74; Strange v. Graham, 56 Ala. 614. **Subdivision 4.**—Smith v. Harrison, 33 Ala. 706; Preslar v. Stallworth, 37 Ala. 402; Slaughter v. Mobile Co., 73 Ala. 134. **Subdivision 5.**—Smith v. Branch Bank, 7 Ala. 880; Owen v. Henderson, Ib. 641; Bradford v. Spyker, 32 Ala. 134; Smith v. Harrison, 33 Ala. 706; Flinn v. Barber, 61 Ala. 530; Wise v. Falkner, 45 Ala. 471; Cleveland v. Williamson, 57 Ala. 402; Causler v. Wharton, 62 Ala. 358; Brewer v. Brewer, 68 Ala. 210; Nooe v. Garner, 70 Ala. 443. **Subdivision 6.**—Boynton v. Sawyer, 35 Ala 498; Slatter v. Meek, Ib. 528; James v. James, 55 Ala. 525; Kirkland v. Trott, 75 Ala. 32. **Subdivision 7.**—Governor v. Stonum, 11 Ala. 679; Ragland v. Calhoun, 36 Ala. 606; Rives v. Flinn, 47 Ala. 481; Fretwell v. McLemore, 52 Ala. 124; Greenlee v. Greenlee, 62 Ala. 330; Vandiveer v. Ware, 65 Ala. 606; Harrison v. Heflin, 54 Ala. 553; Wright v. Lang, 66 Ala. 389; Adams v. Jones, 68 Ala. 117; Bonner v. Young, Ib. 35; Martin v. Tally, 72 Ala. 23. **Subdivision 8.**—Kimbro v. Waller, 21 Ala. 376.

2616 (3227). **Limitation of five years.**—Within five years, all actions founded on equities of redemption, where lands have been sold under a decree of the court of chancery, existing in any person not a party to the proceedings, who claims under the mortgagor or grantor in the deed of trust.

Hunt v. Ellison, 32 Ala. 173.

2617 (3228). **Limitation of four years.**—Within four years, all actions or motions against any surety to any writ of error, appeal, replevy, or forthcoming bond, executed in any cause in any of the courts of the United States, or of any other state or country except this state.

2618 (3229). **Limitation of three years.**—Within three years, actions to recover money due by open or unliquidated account, the time to be computed from the date of the last item of the account, or from the time when, by contract or usage, the account is due.

What is an open account.—Sheppard v. Wilkins, 1 Ala. 62; Goodwin v. Harrison, 6 Ala. 438; Mims v. Sturtevant, 18 Ala. 274. **What is not.**—Smith v. Branch Bank, 7 Ala. 880; Carville v. Reynolds, 9 Ala. 969; Caruthers v. Mardis, 3 Ala. 599; Bradford v. Barclay, 39 Ala. 33; Taylor v. Forsey, 56 Ala. 426; Battle v. Reid, 68 Ala. 149. **Mutual accounts.**—Wilson v. Calvert, 18 Ala. 274; Todd v. Todd, 15 Ala. 743; Bradford v. Spyker, 32 Ala. 135; McCulloch v. Judd, 20 Ala. 703. **Plea of the statute.**—Winston v. University, 1 Ala. 124; Brooks v. McFarland, 20 Ala. 483; Harrison v. Harrison, 39 Ala. 489; Wright v. Preston, 55 Ala. 570; Galbreath v. Cole, 61 Ala. 139; Battle v. Reid, 68 Ala. 149; Gayle v. Johnston, 72 Ala. 254; Clark v. Guard, 73 Ala. 456.

2619 (3231). **Limitation of one year.**—Within one year,—

1. Actions for malicious prosecutions.

2. Actions for criminal conversation, for seduction, or breach of marriage promise.

3. Actions qui tam, or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation.

4. Actions of libel or slander.

5. Actions for damages for wrongful act or omission, causing personal injury to, or death of a minor, under section 2588.

6. Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated.

Subdivision 6.—Roundtree v. Brantley, 34 Ala. 544; McGill v. Monette, 37 Ala. 49; Polly v. McCall, Ib. 20; Nicholson v. M. & M. R. R. Co., 49 Ala. 205; Eagle Co. v. Gibson, 62 Ala. 369; M. & M. R. R. Co. v. Crenshaw, 65 Ala. 567; Huss v. Central R. R. Co., 66 Ala. 472; Hughes v. Anderson, 68 Ala. 280; A. G. S. R. R. Co. v. Hawk, 72 Ala. 112.

ARTICLE II.

GENERAL RULES.

2620 (3232). **When entry on lands presumed.**—When a right of entry on lands accrues, the entry must be considered as having been made, and the cause of action as having then accrued.

2621 (3233). **When right of entry not tolled.**—The right of entry is not tolled by a descent cast.

2622 (3234). **Time of absence from state deducted.**—When any person is absent from the state during the period within which a suit might have been brought against him, the time of such absence must not be computed as a portion of the time necessary to create a bar under this chapter.

Smith v. Bond, 8 Ala. 386; Bohannon v. Chapman, 13 Ala. 641; State Bank v. Seawell, 18 Ala. 616; Coleman v. Holmes, 44 Ala. 124; Scruggs v. Orme, 46 Ala. 533; Wright v. Preston, 55 Ala. 570; Minniece v. Jeter, 65 Ala. 222; Huss v. Central R. R. Co., 66 Ala. 472; Wright v. Strauss, 73 Ala. 227.

2623 (3235). **On arrest or reversal of judgment, suit brought within a year.**—If any action is brought before the time limited has expired, and judgment is rendered for the plaintiff, and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence suit again within one year from the reversal or arrest of such judgment, though the period limited may in the meantime have expired; and, in like manner, if more than one judgment is arrested or reversed, suit may be recommenced within one year.

Roland v. Logan, 18 Ala. 307; Young v. Davis, 30 Ala. 213; Bercy v. Lavretta, 63 Ala. 375; Morrison v. Stevenson, 69 Ala. 448; Hill v. Huckabee, 70 Ala. 183.

2624 (3236). **Additional time allowed infants, etc.**—If any one entitled to bring any of the actions enumerated in this chapter, or to make an entry on land, or defense founded on the title to real property, be, at the time such right accrues, within the age of twenty-one years, or a married woman, or insane, or imprisoned on a criminal charge for any term less than for life, he or she shall have three years after the termination of such disability to bring suit, or make entry or defense; but no disability shall extend the period of limitation so as to allow such action to be commenced, or entry or defense made, after the lapse of twenty years from the time the cause of action or right accrued; nor shall this exception extend to a married woman in respect to her separate estate.

Hunt v. Ellison, 32 Ala. 173; Greenwood v. Coleman, 34 Ala. 150; Fleming v. Gilmer, 35 Ala. 62; McCartney v. Bone, 40 Ala. 533; Daniel v. Day, 51 Ala. 431; Molton v. Henderson, 62 Ala. 426; Tayloe v. Dugger, 66 Ala. 445; Taylor v. Forsey, 56 Ala. 426; James v. James, 55 Ala. 525.

2625 (3237). **Effect of bar of foreign statute.**—When the statute of limitations of another state or foreign country has created a bar to an action upon a contract made or act done in such state or country, whilst the party sought to be charged thereby was a resident of such state or country, the bar thus created is effectual in this state against any suit brought thereon, in the same manner it would have been in the state or country where the act was done or contract made.

Minniece v. Jeter, 65 Ala. 223; Wright v. Strauss, 73 Ala. 227; Howell v. Hair, 15 Ala. 194.

2626 (3238). **Limitations not applicable to current accounts between merchants.**—The limitations in this chapter provided do not apply to such actions as concern the trade of merchandise between merchants and merchants, their agents and factors, while the accounts between them are current.

McCulloch v. Judd, 21 Ala. 703; Bradford v. Spyker, 32 Ala. 135; Shaw v. Yarborough, 3 Ala. 588.

2627 (3239). **How time reckoned on mutual accounts.** When there are mutual accounts between persons who are not merchants, the time must be computed from the date of the last item, unless the account is liquidated, and a balance struck.

Wilson v. Calvert, 18 Ala. 274; Todd v. Todd, 15 Ala. 743.

2628 (3240). **What necessary to remove bar.**—No act, promise, or acknowledgment is sufficient to remove the bar to a suit created by the provisions of this chapter, or is evidence of a new or continuing contract, except a partial payment made upon the contract by the party sought to be charged before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby.

Partial payments.—Wright v. Payne, 62 Ala. 345; Minniece v. Jeter, 65 Ala. 223; Steele v. Steele, 64 Ala. 438; Scott v. Ware, Ib. 174; Acklen v. Hickman, 60 Ala. 568; Harwood v. Harper, 54 Ala. 659; Knight v. Clements, 45 Ala. 89; Taylor v. Perry, 48 Ala. 240; Lewis v. Ford, 67 Ala. 143; Royston v. May, 71 Ala. 398; Curtis v. Daughdrill, Ib. 590; Watson v. Dale, 1 Port. 247; McGehee v. Greer, 7 Port. 537. **Promise.**—Crawford v. Childress, 1 Ala. 482; Jordan v. Hubbard, 26 Ala. 433; Bumgardner v. Taylor, 28 Ala. 687; Evans v. Carey, 29 Ala. 99; Duffie v. Phillips, 31 Ala. 571; Bradford v. Spyker, 32 Ala. 134; Pearson v. Darrington, Ib. 227; Strickland v. Walker, 37 Ala. 385; Greening v. Brown, Minor, 353; Grimball v. Mastin, 77 Ala, 553. **Effect of partial payment or promise by one joint obligor against another.**—Lowther v. Chappell, 8 Ala. 353; Moore v. Leseur, 18 Ala. 606; Myatt v. Bell, 41 Ala. 222; Espey v. Comer, 76 Ala. 501. **By personal representative on estate.**—Townes v. Ferguson, 20 Ala. 147; Pitts v. Wooten, 24 Ala. 474; Hall v. Darrington, 9 Ala. 502. **By personal representative on rights of the heirs.**—Steele v. Steele, 64 Ala. 439; Starke v. Wilson, 65 Ala. 576; Lee v. Downey, 68 Ala. 99; Grimball v. Mastin, 77 Ala. 553.

2629 (3241). **How time computed when demand necessary to enforcement of a right.**—When a right exists, but a demand is necessary to entitle the party to an action against any officer, agent, or attorney, the limitation commences from the commission or omission of the act giving the right of action, and not from the date of the demand.

Wright v. Paine, 62 Ala. 340.

2630 (3242). **In actions seeking relief on ground of fraud.** In actions seeking relief on the ground of fraud, where the statute has created a bar, the cause of action must not be considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud, after which he must have one year within which to prosecute his suit.

Porter v. Smith, 65 Ala. 169; Underhill v. Mobile Ins. Co., 67 Ala. 45; McCarthy v. McCarthy, 74 Ala. 555; Holt v. Wilson, 75 Ala. 58; Proskauer v. People's Bank, 77 Ala. 257.

2631 (3243). **Commencement of suit.**—The suing out of a summons is the commencement of a suit, whether it be executed or not, if the suit be continued by an alias, or recommenced at the next term of the court.

2632 (3244). **What time after death and before grant of letters not computed.**—The time between the death of a person and the grant of letters testamentary or of administration,

not exceeding six months, is not to be taken as any part of the time limited for the commencement of actions by or against his executors or administrators.

McNeill v. McNeill, 35 Ala. 30; Pickett v. Hobdy, 63 Ala. 609; Allen v. Elliott, 67 Ala. 432; Lewis v. Ford, Ib. 143; Lee v. Downey, 68 Ala. 98.

2633 (3245). **Nor six months personal representative exempt from suit.**—The six months, during which an executor or administrator is exempt from suit after the grant of letters, is not to be taken as any part of the time limited for the commencement of an action against him.

Steele v. Steele, 64 Ala. 438; Allen v. Elliott, 67 Ala. 432.

2634 (3246). **In action by principal against deputy or agent for latter's act or omission.**—When an injury arises from the act or omission of a deputy or agent, the time for the limitation of an action by the principal against such deputy or agent does not commence to run until the liability of the principal, for the act or omission of such deputy or agent, is ascertained by suit of the party aggrieved against the principal.

2635 (3247). **Time of injunction or prohibition not computed.**—When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not computed as part of the time.

2636 (3248). **When operation of statute not suspended.** A disability which did not exist when the cause of action accrued does not suspend the operation of the limitation, unless the contrary is expressly provided.

Lee v. Leachman, 22 Ala. 452; Reed v. Minell, 30 Ala. 61; Daniel v. Day, 51 Ala. 431; Smith v. Roberts, 62 Ala. 83; Molton v. Henderson, Ib. 426; Underhill v. Mobile Ins. Co., 67 Ala. 45.

2637 (3249). **All disabilities to cease before time begins.** When two or more disabilities co-exist at the time the cause of action accrued, the limitation does not attach until all are removed.

2638 (3250). **When war suspends statute.**—When the United States is at war with a foreign country, and either party to a contract is a subject or citizen thereof, the time of the continuance of the war is not computed as part of the time limited for the commencement of the suit.

2639 (3251). **Notes put in circulation as money.**—The provisions of this chapter do not apply to actions to enforce payment of bills, notes, or other evidences of debt issued or put in circulation as money.

CHAPTER 3.

THE VENUE.

ARTICLE 1.—Where suit brought.
2.—Change of venue.

ARTICLE I.

WHERE SUIT BROUGHT.

2640 (2928). **Venue of suits.**—All actions on contracts, except as may be otherwise provided, must be brought in the county in which the defendant, or one of the defendants, resides, if such defendant has within the state a permanent residence; all other personal actions, if the defendant, or one of the defendants, has within the state a permanent residence, may be brought in the county of such residence, or in the county in which the act or omission complained of may have been done, or may have occurred. All actions for the recovery of land, or of the possession thereof, or for a trespass thereto, must be brought in the county where the land lies; a summons issuing contrary to this section must be abated on the plea of the defendant.

Herndon v. Givens, 16 Ala. 261.

2641 (2929). **Residents of new counties not organized.** Persons residing in new counties may sue and be sued in the counties from which their residences are taken, until such new counties have elected their officers and are organized.

2642. Corporation sued in any county where it does business by agent.—A foreign or domestic corporation may be sued in any county in which it does business by agent. Feb. 13, 1879, p. 197.

Home Ins. Co. v. Richards, 74 Ala. 466.

2643 (2930). **Suits by, or for the use of the state.**—At the election of the attorney-general, all suits or summary proceedings by or for the use of the state, founded on the breach of the official bond of a state officer, or of a former state officer, of a tax-collector or former tax-collector, of a judge of probate or former judge of probate, of a tax-assessor or former tax-assessor, may be instituted in a court of the county of Montgomery having jurisdiction of the subject-matter, or in a court of the county in which any one of the obligors in such bond may reside.

2644 (2931). **Where suit brought upon contracts for the hire of convicts.**—Suits upon contracts for the hire of state convicts shall be in the name of the state, and may be instituted in the county of the residence of the defendants, or either of them, or in the county of Montgomery, at the discretion of the attorney-general.

ARTICLE II.

CHANGE OF VENUE.

2645 (3114). **Venue changed once on motion of a party.** Either party to a civil suit may, at any time before final trial, move the court to change the venue, making affidavit that, for

causes set forth, he cannot have a fair and impartial trial in the county where the suit is pending. The court may direct a change to the nearest county free from proper exception by either party, to be determined by affidavits; and, whenever it will best secure the ends of justice, may require the applicant to give bond and security for costs. The same party can have the venue changed but once.

Ex parte Remson, 23 Ala. 25; Gager v. Gordon, 29 Ala. 341; Ex parte Holton, 69 Ala. 164.

2646 (3115). **Depositions of witnesses in the county taken.** When there has been a change of venue, the party opposed to such change may take the depositions of witnesses residing in the county from which the venue has been changed, under the same rules and regulations as are now provided by law for taking depositions in other cases.

2647 (3116). **Witnesses subpœnaed to attend at place of trial.**—The clerk of the court where the cause is pending must, unless otherwise directed, issue subpœnas to all witnesses to attend the court to which the venue is changed.

2648 (3118). **Original paper and transcript of orders transmitted.**—When a change of venue is directed, the clerk of the court must make a transcript of all the minutes, orders and other proceedings in the cause, and certify under the seal of his court that the same is a true copy. This transcript, together with all the original papers, he must envelope and securely seal, and write his name across the seals, and certify on the back of the envelope that the enclosed papers, numbered from 1 to ——, include all the original papers in the cause, naming it; and these signatures and certificates must be received as true until the contrary is shown. This package the clerk may deliver himself, or send by messenger or express to the clerk of the trial court, and, if not mutilated or defaced, must be presumed to be as it came from the hands of the clerk of the court from which the venue is changed.

2649 (3119). **Pay of messenger for carrying the papers.** The clerk or messenger so carrying the papers is entitled to five cents per mile and tolls and ferriages going and returning, which must be paid in advance by the party applying for the change of venue; if paid by the opposing party, to be taxed in the bill of costs against his adversary.

Ex parte Holton, 69 Ala. 164.

2650 (3117). **Trial removed to new county if defendant resides in it.**—In like manner, when new counties are formed out of old counties, the original papers of all unfinished business in the county where the defendant resided, with a transcript of all orders made in the cause, must be transmitted to the new county as soon as it is organized.

CHAPTER 4.

THE SUMMONS.

2651 (2924). **Civil actions commenced by summons.**—All civil actions in courts of record, except in such cases as are otherwise provided by this Code, must be commenced by the service of summons.

Cruise v. Riddle, 21 Ala. 791; East T., V. & G. R. R. Co. v. Bayliss, 74 Ala. 151.

2652 (2925). **Summons and complaint.**—The summons must be issued by the clerk of the court, and be accompanied by the complaint of the plaintiff, signed by him or his attorney, setting forth the cause of action.

Browder v. Gaston, 30 Ala. 677.

2653 (2926). **Form.**—The summons must be in the following form:

"The State of Alabama, } To any sheriff of the State of Ala-
——— county. } bama:

"You are hereby commanded to summon A. B. to appear at the next term of the circuit court, to be held for said county at the place of holding the same, then and there to answer the complaint of C. D. Witness my hand, this —— day of———.

"E. F., Clerk."

Summons, not signed by clerk, will not support judgment by default.—Costley v. Driver, 45 Ala. 230; Wilson v. Owens, Ib. 451; Winnemore v. Matthews, Ib. 449; Sheppard v. Powers, 50 Ala. 377. **Need not state day on which court will be held.**—Yonge v. Broxson, 23 Ala. 684. **Date and form not conclusive.**—Huss v. Central R. R. Co., 66 Ala. 472.

2654 (2927). **Branch summons when defendants in different counties.**—When any joint or joint and several cause of action exists, and the defendants reside or may be found in different counties, a summons may issue from the court having jurisdiction of any one of such defendants, and be executed in any county, which must be returned and filed in the court from which the process issued, and constitute but one suit, in the same manner as if but one summons had issued against all the defendants; and it is the duty of the clerk, on issuing such branch summons, to indorse thereon that it is a branch of the original suit, and that all the summons constitute one suit, and are for one and the same cause of action.

Lewis v. Grace 44 Ala. 307; Boardman v. Parrish, 56 Ala. 54.

2655 (2932). **Execution and return of summons.**—The summons must be executed by the sheriff or other officer in any county, by leaving a copy of the summons and complaint with the defendant, which fact he must return with the process.

Waiver of defect in service.—Kennedy v. Young, 25 Ala. 563; Lampley v. Beavers, Ib. 534. **When no service.**—Melvin v. Clark, 45 Ala. 285. **What a sufficient service.**—Eslava v. Ames Plow Co., 47 Ala. 384; Lenoir v. Broadhead, 50 Ala. 58. **Service on Sunday a mere irregularity.**—Comer v. Jackson, 50 Ala. 384.

2656 (2933). **Service on one representative sufficient.** When there are two or more executors or administrators of an estate, service of summons on one is sufficient.

Huff v. Davidson, 44 Ala. 273.

2657 (2934). **How corporation served.**—When the suit is against a corporation the summons may be executed by the delivery of a copy of the summons and complaint to the president or other head thereof, secretary, cashier, station agent, or any other agent thereof.*

Lyon v. Lorant, 3 Ala. 151; W. & C R. R. Co. v. Cole, 6 Ala. 655; Oxford Iron Co. v. Spradley, 42 Ala. 24; Talladega Ins. Co. v. McCullough, Ib. 667; Southern Ex. Co. v. Carroll, Ib. 437; M. & E. R. R. Co. v. Hartwell, 43 Ala. 508; A. & T. R R. Co. v. Burns, Ib. 169; Talladega Ins. Co. v. Woodward, 44 Ala. 287; W. U. Tel. Co. v. Pleasants, 46 Ala 641; M. & C. R. R. Co. v. Whorley, 74 Ala. 264; Manhattan Ins. Co. v. Fowler, 76 Ala. 372; Central R. R. Co. v. Carr, Ib. 388.

2658 (2936). **When executed in adjoining county.**—When the summons issues to the sheriff of the county in which the defendant resides, he may execute it in an adjoining county if the defendant is there found.

2659 (2937). **Summons to county executed on judge of probate.**—When a county is a defendant, the summons must be executed by leaving a copy of the summons and complaint with the judge of probate.

2660 (2938). **When executed by coroner or special coroner.** When the office of sheriff is vacant, and until his successor is qualified, or when the sheriff is imprisoned, or in cases in which the sheriff is a party, or is interested, or otherwise is incompetent to act, if such interest or cause appear on the face of the proceedings, the summons must be directed to, and executed by the coroner; and if such interest or cause does not appear on the face of the proceedings, the coroner must execute the summons, though directed to the sheriff, if the judge of probate, on proper showing by affidavit, direct the execution thereof by the coroner; and when in such cases the coroner has not qualified, or the office is vacant, or when the coroner is absent from the county, having no deputy therein, or when the coroner is imprisoned, or when he is a party to, or interested in the suit, the summons must be directed to, and executed by a special coroner, to be appointed by the judge of probate.

2661 (2939). **Summons executed three days before return.** The summons must be executed at least three days before the return day thereof, and be returned to the office whence it issued on or before the return day; but when the summons has been executed twenty days or more before the return day, it must be returned five days after the execution thereof.

Garner v. Johnson, 22 Ala. 494.

2662 (2940). **When returned, if issued less than three days before term.**—When the summons is issued less than three days before the term of the court next thereafter, it must be made returnable to the next succeeding term.

2663 (2941). **Return day.**—The return day of the summons is the first day of the court to which it is returnable.

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* On 26th February, 1887 (Pamph. Acts 1886–7, p. 68), an act was approved which provides: "That whenever any railroad corporation created by the laws of this state shall permit its railroad to be used or operated by any other person or corporation, whether by contract or otherwise, in any suit against the person or corporation so using or operating such railroad it shall be sufficient service of process on such person or corporation to serve a copy of the same on any depot agent, or person in charge of any depot, along the line of the railroad so used and operated; *Provided*, That affidavit shall be made as provided in section 2935 of the Code of 1876 in all cases where the defendant is a domestic corporation." Section 2935 of the Code of 1876 was omitted from this Code.

CHAPTER 5.

THE PLEADINGS.

ARTICLE 1.—General rules.
2.—The complaint and other pleadings.

ARTICLE I.

GENERAL RULES.

2664 (2978). **Pleadings to be short; no objection for want of form.**—All pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts, or matter to be put in issue, in an intelligible form; no objection can be allowed for defect of form, if facts are so presented that a material issue in law or fact can be taken by the adverse party thereon.

Clark v. Godard, 39 Ala. 164; Randolph v. Sharpe, 42 Ala. 265; Graham v. Gunn, 45 Ala. 577; Hall v. Brazelton, 46 Ala. 359; Munter v. Rogers, 50 Ala. 283; M. & M. R. R. Co. v. Crenshaw. 65 Ala. 566; Mohr v. Chaffe, 75 Ala. 387; Lang v. Waters, 47 Ala. 624; Wren v. State, 70 Ala. 1.

2665 (2979). **Pleadings struck out for prolixity on motion.** If any pleading is unnecessarily prolix, irrelevant, or frivolous, it may be stricken out at the costs of the party so pleading, on motion of the adverse party; and any pleading which conforms substantially to the schedule of forms in this Code is sufficient.

Ware v. St. Louis Co., 47 Ala. 667; Cotton v. Ward, 45 Ala. 359.

2666 (2980). **Complaint for defamation.**—No colloquium or innuendo is necessary in actions for defamation; it is sufficient to state in the complaint that the defendant falsely and maliciously charged the plaintiff with perjury, larceny, or other crime, or as the case may be, in substance as follows, setting it out.

2667 (2981). **Consideration of sealed instrument may be inquired into.**—The defendant may by plea impeach or inquire into the consideration of a sealed instrument in the same manner as if it had not been sealed.

Kinnebrew v. Kinnebrew, 35 Ala. 628; Johnson v. Caffey, 59 Ala. 331.

2668 (2982, 3033). **Assignment of breaches on penal bond.** In actions upon penal bonds or other writings, for the non-performance of any covenant or agreement contained therein, the plaintiff may assign such breaches as he may deem proper, and verdict and judgment may be rendered for the plaintiff for such of the breaches as he may prove; and if judgment be rendered for the plaintiff by default or nil dicit, a writ of inquiry of damages must be awarded. Judgment shall in no case exceed principal and interest due on the instrument.

Gaines v. Shelton, 47 Ala. 413.

2669 (2983). **New actions on same contract.**—Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

2670 (2984). **Profert dispensed with; notice to produce.** No profert of a sealed instrument is required in pleading, but, at any time previous to the trial, the defendant may have in-

spection of the bond or other instrument sued on, upon notice to the attorney of the party; or when an account is the foundation of the suit, a list of the items composing it.

Pryor v. Johnson, 32 Ala. 27; Robinson v. Allison, 36 Ala. 525; Fountain v. Ware, 56 Ala. 558; Hayes v. Woods, 72 Ala. 92.

ARTICLE II.

THE COMPLAINT AND OTHER PLEADINGS.

2671 (2985). **Complaint accompanies summons.**—The complaint, which must in all cases accompany the summons, is in lieu of a declaration, and must be signed by the plaintiff or his attorney.

Browder v. Gaston, 30 Ala. 677.

2672 (2986). **Actions on contracts united in one suit.**—All actions on contracts, express or implied, for the payment of money, whether under seal or not, may be united in the same action.

Whilden v. M. & P. Bank, 64 Ala. 1.

Feb. 17, 1885, p. 125.

2673. Joinder of trespass and case.—Counts in trespass and in trespass on the case may be joined, when they relate to the same subject-matter.

2674 (2987). **Form and substance of plea.**—The plea must consist of a succinct statement of the facts relied on in bar or abatement of the suit, and no objection can be taken thereto, if the facts are so stated that a material issue can be taken thereon.

See citations to sections 2664 and 2665.

2675 (2988). **Pleas general or special.**—The defendant may plead more pleas than one; and, if he does not rely solely on a denial of the plaintiff's cause of action, must plead specially the matter of defense. In all actions for defamation, or for injuries to the person, or to real or personal property, the general issue is "not guilty," and puts in issue all the material allegations of the complaint; in all other actions the general issue is an averment that the allegations of the complaint are untrue, and, except as may be otherwise provided, puts in issue only the truth of such allegations.

Phillips v. Kelly, 29 Ala. 629; Stern v. Ashby, 30 Ala. 363; Hopkinson v. Shelton, 37 Ala. 306; Kannady v. Lambert, Ib. 57; A. & T. R. R. Co. v. Watson, 42 Ala. 75; Slaughter v. Doe, 67 Ala. 494.

2676 (2989). **What pleas must be sworn to.**—All pleas in abatement, unless it be of matter of record, pleas which deny the execution by the defendant, his agent, attorney, or partner, of any instrument in writing, the foundation of the suit, or the assignment of the same, or which set forth any instrument in writing, whether under seal or not, which is alleged to be lost or destroyed, and pleas since the last continuance must be verified by affidavit.

When agreement as to pleas does not cover sworn pleas.—Ala. & F. R. R. Co. v. Watson, 42 Ala. 75. **Pleas in abatement.**—Hall v. Wallace, 25 Ala. 438; Hall v. Brazelton, 46 Ala. 359; Tommey v. Gamble, 66 Ala. 469. **Non est factum.**—Martin v. Dortch, 1 Stew. 479; Fowlkes v. Baldwin, 2 Ala. 705; Lazarus v. Shearer, Ib. 718; McWhorter v. Lewis, 4 Ala. 198; Bryan v. Wilson, 27 Ala. 208; McDougald v. Rutherford, 30 Ala. 253; Ala. Mining Co. v. Brainard, 35 Ala. 476; M. &

E. R. R. Co. v. Trebles, 44 Ala. 255. **Since last continuance.**—McDougald v. Rutherford, 30 Ala. 253; Penn v. Edwards, 50 Ala. 63. **Denying ownership of plaintiff.** Agee v. Medlock. 25 Ala. 281.

2677 (2990). **How character of plea determined.**—Whether a plea is in bar or abatement, is ascertained by the subject-matter and prayer of the plea.

Day v. Huckabee, 60 Ala. 425; Mohr v. Chaffe, 75 Ala. 388.

2678 (2991). **Set-offs; when allowed.**—Mutual debts, liquidated or unliquidated demands not sounding in damages merely, subsisting between the parties at the commencement of the suit, may be set off one against the other by the defendant or his personal representative, whether the legal title be in the defendant or not; and such set-off, if found for the defendant, extinguishes, either in whole or in part, as the case may be, the plaintiff's demand; but the wages or hire of any head of a family in this state, not having property liable to levy and sale under execution, cannot be defeated or abated by any set-off of a money demand acquired by the person contracting to pay such wages by assignment or transfer, unless the parties otherwise agree in writing.

Subsisting at the commencement of the suit.—Franklin v. McGuire, 10 Ala. 557; Johnson v. King, 20 Ala. 270; Russell v. Redding, 50 Ala. 448; Tyree v. Parham, 66 Ala. 424; Collins v. Greene, 67 Ala. 211; Goldthwaite v. Nat. Bank, Ib. 549; Wood v. Steele, 65 Ala. 436. **Demands allowed as set-offs.**—Brazier v. Fortune, 10 Ala. 516; Gafford v. Proskauer, 59 Ala. 264; Hall v. Chenault, 13 Ala. 710; Russell v. Redding, 50 Ala. 448; Collins v. Greene, 67 Ala. 211; Martin v. Wharton, 38 Ala. 637; Smith v. Crawford, 14 Ala. 201; Campbell v. Conner, 78 Ala. 211; Briggs v. Moore, Ib. 433. **Demands not allowed.**—Cole v. Justice, 8 Ala. 793; Walker v. McCoy, 34 Ala. 659; Franklin v. McGuire, 10 Ala. 557; Johnson v. King, 20 Ala. 270; Scott v. Rivers, 1 Stew. & Port. 19; White v. Word, 22 Ala. 442; Collins v. Greene, 67 Ala. 211; Pulliam v. Owen, 25 Ala. 492. **"Sounding in damages merely;" what demands are.**—Martin v. Wharton, 38 Ala. 637; Collins v. Greene, 67 Ala. 211; Rosser v. Bunn, 66 Ala. 89; Walker v. McCoy, 34 Ala. 657; Johnson v. Smith, 70 Ala. 108. **What demands are not.**—Gibson v. Marquis, 29 Ala. 668; Wood v. Fowler, 37 Ala. 55; Cage v. Phillips, 38 Ala. 382; Lang v. Waters, 47 Ala. 624; Eads v. Murphy, 52 Ala. 520; Sledge v. Swift, 53 Ala. 116; Hooper v. Armstrong, 69 Ala. 343; M. & M. R. Co. v. Clanton, 59 Ala. 392; Holley v. Younge, 27 Ala. 203; Nelins v. Prewitt, 37 Ala. 389. **Title necessary to sustain.**—Bell v. Horton, 1 Ala. 413; Adams v. McGrew, 2 Ala. 675; Smith v. Taylor, 9 Ala. 633; McDade v. Mead, 18 Ala. 214; Hudson v. Weir, 29 Ala. 294; Skipper v. Stokes, 42 Ala. 255; Hooper v. Armstrong, 69 Ala. 344; Bowen v. Snell, 11 Ala. 379; Jones v. Blair, 57 Ala. 457; Gildersleeve v. Caraway, 19 Ala. 246; Taylor v. Bass, 5 Ala. 110; Johnson v. King, 20 Ala. 270. **Joint or partnership demands.** Carson v. Barnes, 1 Ala. 93; Taylor v. Bass, 5 Ala. 110; Van Pheel v. Connally, 9 Port. 452; Hale v. Brown, 11 Ala. 87; Jones v. Jones, 12 Ala. 244; Hoyt v. Murphy, 18 Ala. 316; McKinley v. Winston, 19 Ala. 301; Ross v. Pearson, 21 Ala. 473; Scott v. Campbell, 30 Ala. 728; Pierce v. Pass, 1 Port. 232; Evans v. Sims, 37 Ala. 710; Clark v. Taylor, 68 Ala. 453; Watts v. Sayre, 76 Ala. 397; Duramus v. Harrison. 26 Ala. 326; Bank of Mobile v. Poelnitz, 61 Ala. 147; Sledge v. Swift, 53 Ala. 110; Huddleston v. Askey, 56 Ala. 218; Riley v. Stallworth, Ib. 481; Mitchell v. Burt, 9 Ala. 226; Winston v. Metcalf, 6 Ala. 756; Locke v. Locke, 57 Ala. 473; Jones v. Brevard, 59 Ala. 499. **Demands against estates of decedents.**—Perrine v. Warren, 3 Stew. 151; Palmer v. Steiner, 68 Ala. 400; Pitcher v. Patrick, Minor, 208; Hale v. Brown, 11 Ala. 87; Farris v. Houston, 78 Ala. 250. **Right of surety as to set-off or retainer against his principal.**—Wood v. Steele, 65 Ala. 436; Tyree v. Parham, 66 Ala. 424; Goldthwaite v. Nat. Bank, 67 Ala. 549. **Does not apply to suit by state.**—White v. Governor, 18 Ala. 767. **Plaintiff cannot be deprived of his exemptions by set-off.**—Ex parte Hunt, 62 Ala. 1. **When not affected by statute of non-claim.**—Palmer v. Steiner, 68 Ala. 400. **As ground of jurisdiction in equity.**—T., C. & D. R. R. Co. v. Rhodes, 8 Ala. 206; Donelson v. Posey, 13 Ala. 752; Cave v. Webb, 22 Ala. 583; White v. Wiggins, 32 Ala. 424; Gafford v. Proskauer, 59 Ala. 264; Goldthwaite v. Nat. Bank, 67 Ala. 549; Wood v. Steele, 65 Ala. 436; Carroll v. Malone, 28 Ala. 521; Ingraham v. Foster, 31 Ala. 123; Tate v. Evans, 54 Ala. 16; Martin v. Mohr, 56 Ala. 436; Nelms v. Prewitt, 37 Ala. 389; Campbell v. Conner, 78 Ala. 211; Farris v. Houston, Ib. 250; Walker v. Wigginton, 50 Ala. 579. **Requisites of plea.**—Castleman v. Jeffries, 60 Ala. 380; s. c., 68 Ala. 432; Lang v. Waters, 47 Ala. 624. **Not**

available under general issue.—Kannady v. Lambert, 37 Ala. 57. **Unless pleaded, judgment not conclusive.**—Robbins v. Harrison, 31 Ala. 160. **Plaintiff cannot apply set-off as payment.**—Wharton v. King, 69 Ala. 365.

2679 (2992). **Judgment for defendant for excess so set-off and costs.**—If the debt or demand so offered to be set-off exceed the amount of the plaintiff's demand, the amount of such excess being found by the jury, judgment must be rendered against the plaintiff for costs, and in favor of the defendant for such excess.

Locke v. Locke, 57 Ala. 473.

2680 (2993). **Judgments set-off on motion.**—Judgments may be set-off against each other by a court of record on motion.

Ex parte Lehman, 59 Ala. 631.

2681 (2994). **Surety may set-off debt due principal.**—A co-maker or surety sued alone may, with the consent of his co-maker or principal, avail himself, by way of set-off, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-maker or principal.

Beard v. Union & American Pub. Co., 71 Ala. 60.

2682 (2996). **When set-off not barred by statute of limitations.**—When the defendant pleads a set-off to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant is nevertheless entitled to his set-off, where it was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in suit.

Riley v. Stallworth, 56 Ala. 481; Rosser v. Bunn, 66 Ala. 89; Washington v. Timberlake, 74 Ala. 259; Jeffries v. Castleman, 75 Ala. 262.

Jan. 25, 1879, p. 154.

2683. Plea of recoupment.—On a plea of recoupment, if the claim or demand of the defendant equals the claim or demand of the plaintiff, judgment must be rendered for the defendant; if the claim or demand of the defendant exceeds the claim or demand of the plaintiff, and the plaintiff be the party liable to its satisfaction, judgment must be rendered against him in favor of the defendant for such excess and all costs.

Martin v. Brown, 75 Ala. 442.

2684 (2995). **Negotiable paper not subject to set-off or recoupment.**—Paper governed by the commercial law, negotiated before maturity, is not subject to set-off or recoupment.

Kennedy v. Manship, 1 Ala. 43; Stocking v. Toulmin, 3 Stew. & Port. 35; McKenzie v. Hunt, 32 Ala. 494; Bostick v. Scruggs, 50 Ala. 10; Bank of Mobile v. Poelnitz, 61 Ala. 147; Lewis v. Faber, 65 Ala. 460.

2685 (2997, 2998). **Plea of tender.**—A plea of tender of money, or of a thing in action, must be accompanied by a delivery of the money or such thing in action to the clerk of the court; if the tender be of ponderous articles or other personal property, the plea must aver a readiness to deliver it to the plaintiff, and judgment for the defendant upon the plea vests the title to the thing tendered in the plaintiff, subject to any claim the defendant may have for his trouble in keeping it.

Rudulph v. Wagner, 36 Ala. 698; Daughdrill v. Sweeney, 41 Ala. 310; Jonsen v. Nabring, 50 Ala. 392; Alexander v. Caldwell, 61 Ala. 543; Ashworth v. State, 63 Ala. 120; Park v. Wiley, 67 Ala. 310; Frank v. Pickens, 69 Ala. 369; Caldwell v. Smith, 77 Ala. 157.

2686 (3000). **Plea since last continuance.**—A plea since the

last continuance is not a waiver of any plea to the merits previously pleaded.

Dolberry v. Trice, 49 Ala. 207; Wright v. Evans, 53 Ala. 103.

2687 (2999). **Indorsement on pleas.**—All pleas must, when filed, be indorsed by the clerk with the true date, and, for want of such indorsement, may be rejected by the court on motion, unless sufficient cause be shown.

2688 (3001, 3002, 3003). **Replication.**—The plaintiff may file more than one replication. The general replication is, "the plaintiff joins issue on said plea." A special replication is a brief statement, in plain language, of the facts relied on as an answer to the plea.

2689 (3004). **Subsequent pleadings.**—The rules of this chapter relative to pleas and replications apply to all subsequent pleadings.

2690 (3005). **Demurrer.**—No demurrer in pleading can be allowed but to matter of substance, which the party demurring specifies; and no objection can be taken or allowed which is not distinctly stated in the demurrer.

When ground not distinctly stated.—Burns v. Mayor, 34 Ala. 485; Helvenstein v. Higgason, 35 Ala. 259; Robbins v. Mendenhall, Ib 722; Pomeroy v. State, 40 Ala. 63; Ala. & Fla. R. R. Co. v. Watson, 42 Ala. 75; State v. Gardner, 45 Ala. 47; Donegan v. Wood, 49 Ala. 242; Courts v. Happle, Ib. 254; Eads v. Murphy, 52 Ala. 520; Daniels v. Hamilton, Ib. 105; Masterson v. Gibson, 56 Ala. 56; Troy v. Coleman, 58 Ala. 570; Brewer v. Watson, 65 Ala. 88; M. & M. R. R. Co. v. Crenshaw, Ib. 567; Grimmet v. Henderson, 66 Ala. 521; Williams v. Bowdin, 68 Ala. 126. **When sufficiently stated.**—Brock v. S. & N. R. R. Co., 65 Ala. 79. **Duplicity in complaint not available ground.**—Houston v. Hilton, 67 Ala. 374. **Matter of substance.**—Hall v. Brazelton, 46 Ala. 360. **Only consider grounds stated.** Cotton v. Rutledge, 33 Ala. 110. **Demurrer to plea cannot be visited upon complaint.**—Henley v. Bush, 33 Ala. 636; Elliott v. Holbrook, Ib. 659. **Misjoinder not available unless specially assigned.**—Owsley v. M. & W. P. R. R. Co., 37 Ala. 501.

2691 (3006). **Amendments; when allowed.**—Either before or after judgment on demurrer, the court must permit an amendment of the pleadings; and such amendment must cause no delay in the trial of the cause, unless injustice will thereby be done.

Russell v. Erwin, 38 Ala. 44; Jones v. Ritter, 56 Ala. 270; Day v. Huckabee, 60 Ala. 425.

2692 (3007). **Plea over after judgment on demurrer does not waive errors.**—The party against whom a judgment on demurrer is rendered may plead over as a matter of right, without waiving his privilege of assigning such judgment as error in an appellate court, unless he has subsequently had the benefit sought by the demurrer upon the trial of other equivalent issues.

Williams v. Ivey, 37 Ala. 242; Phœnix Ins. Co. v. Moog, 78 Ala. 284.

2693 (3008). **Terms for frivolous demurrer.**—If, in the opinion of the court, a demurrer is interposed without cause, terms may be imposed, not exceeding the costs of the action, or a continuance of the cause.

CHAPTER 6.

REAL ACTIONS AND ACTIONS FOR USE AND OCCUPATION.

2694 (2948). **Seal not necessary to enable grantee to sue.** A seal is not necessary to convey the legal title to land to enable the grantee to sue at law. Any instrument in writing signed by the grantor, or his agent having a written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor, to be collected from the entire instrument.

Goodlett v. Hansell, 56 Ala. 346; Jones v. Morris, 61 Ala. 518.

2695 (2970). **Action of ejectment.**—A plaintiff suing for the recovery of lands, or of the possession thereof, has an election to proceed by an action of ejectment, or by an action in the nature of an action of ejectment, as is provided in the succeeding section.

2696 (2959, 2960). **Action in the nature of ejectment.** An action for the recovery of lands, or the possession thereof, in the nature of an action of ejectment, may be maintained without a statement of any lease or demise to the plaintiff, or ouster by a casual or nominal ejector; and the complaint is sufficient if it alleges that the plaintiff was possessed of the premises, or has the legal title thereto, properly designating or describing them, and that the defendant entered thereupon, and unlawfully withholds and detains the same.

Williams v. Hartshorn, 30 Ala. 211; Russell v. Erwin, 38 Ala. 44; Tarver v. Smith, Ib. 135; Harrison v. Parmer, 76 Ala. 157; Morris v. Bebee, 54 Ala. 304.

2697 (2961). **Abstract of title; right to demand.**—In an action of ejectment, or in an action in the nature of an action of ejectment, the defendant may, by notice in writing to the plaintiff or his attorney, not less than ten days before the trial of the cause, demand an abstract in writing of the title or titles on which he will rely for a recovery, and the plaintiff must be confined to the proof of such title or titles; and when such abstract is demanded by the defendant, he must tender, if demanded by the plaintiff or his attorney, five days before the trial, an abstract of the title or titles on which he will rely for defense, and on the trial shall be confined to such title or titles.

2698 (2962). **Effect of pleading general issue.**—The general issue in an action in the nature of an action of ejectment is "not guilty," and under it the defendant may give in evidence the same matters which may be given in evidence under such plea in an action of ejectment; the general issue is an admission that the defendant is in possession of the premises sued for.

King v. Kent, 29 Ala. 542; Bernstein v. Humes, 60 Ala. 582; Crosby v. Pridgen, 76 Ala. 385; Clarke v. Clarke, 51 Ala. 498; Slaughter v. Swift, 67 Ala. 494.

2699 (2963). **Disclaimer of possession.**—The defendant may, in an action of ejectment, or in an action in the nature of an action of ejectment, disclaim possession of the premises sued for, in whole or in part, and, upon such disclaimer, the plaintiff may, if he so elects, take issue; and, if the issue be found for him, he is entitled to judgment as if the defendant had, in an ac-

tion of ejectment, entered into the consent rule, confessing possession as well as lease, entry and ouster, or, in an action in the nature of an action of ejectment, had pleaded "not guilty," admitting possession.

Clarke v. Clarke, 51 Ala. 498; Kirkland v. Trott, 66 Ala. 417; Alexander v. Wheeler, 69 Ala. 332; Callan v. McDaniel, 72 Ala. 96; McQueen v. Lampley, 74 Ala. 408; Morris v. Bebee, 54 Ala. 300.

2700 (2955). **Landlord made party on motion.**—When the suit is against a tenant, the landlord must be made a defendant to the suit on motion of the tenant, or, upon the landlord's application in writing, supported by affidavit that the defendant is his tenant by demise in writing, or is in the occupancy of the land sued for with his consent, or of some portion thereof, which must be specified in the application.

McCaskle v. Amarine, 12 Ala. 18; Falkner v. Keith, Ib. 165; Noble v. Coleman, 16 Ala. 77; Ex parte Webb. 58 Ala. 109.

2701 (2965). **Tenant liable only for rent in arrear.**—A tenant in possession, asserting his right thereto under a lease or license from another, is not liable beyond the rent in arrear at the commencement of the suit, and that which may accrue during the continuance of his possession.

2702 (2951). **Suggestion of adverse possession for three years; proceedings on.**—When a suit is brought to recover land or the possession thereof, the defendant may, at any time before the trial, suggest upon the record that he and those whose possession he has, have, for three years next before the commencement of the suit, had adverse possession thereof. In such case, if the jury find for the plaintiff, they must also ascertain by their verdict whether such suggestion be true or false.

Lamar v. Minter, 13 Ala. 31; Gager v. Doe, 29 Ala. 341; Stephens v. Westwood, 25 Ala. 716; N. O. & S. R. R. Co. v Jones, 68 Ala. 48; Humes v Bernstein, 72 Ala. 547; Pickett v. Doe, 74 Ala. 122; Turnipseed v. Fitzpatrick, 75 Ala. 297.

2703 (2952). **Verdict and judgment on suggestion.**—If they find it to be false, they must return a verdict for the damages as in ordinary cases. If they find it to be true, they must assess the value, at the time of trial, of the permanent improvements made by the defendant, or those whose estate he has, and also ascertain by their verdict the value of the lands, and of the use and occupation thereof, not including the increased value by reason of such improvements; if the value of the use and occupation as assessed exceed the value of the permanent improvements made, judgment must be rendered against the defendant for the excess.

2704 (2953). **If value of improvements greater than rents, possession retained for one year.**—If the value of the improvements exceeds the value of the use and occupation, no writ of possession shall issue for one year after the rendition of the judgment, unless the plaintiff, or his legal representative, pay the defendant, or deposit with the clerk for him, the excess of the assessed value of the improvements over the value of the use and occupation.

2705 (2954). **When, on non-payment of excess, plaintiff barred of his writ.**—If the plaintiff, or his legal representative, neglect for the term of one year to pay such excess, and the de-

fendant, or his legal representative, within three months after the expiration of the year, pays to the plaintiff, or to the clerk for him, the value of the land as assessed by the jury, the plaintiff is forever barred from his writ of possession, and from maintaining any action whatever against the defendant, his heirs, or assigns, to recover such land, or the possession thereof.

2706 (2966). **Persons having color of title bona fide, liable for only a year's rent.**—Persons holding possession under color of title, in good faith, are not responsible for damages or rent for more than one year before the commencement of the suit.

Ormond v. Martin, 37 Ala. 598; Dozier v. Mitchell, 65 Ala. 511; Allen v. Kellam, 69 Ala. 443; Turnipseed v. Fitzpatrick, 75 Ala. 297.

Jan. 30, 1885, p. 104.

2707. Action by mortgagee or assignee.—If the action be by a mortgagee, or his assignee, against the mortgagor, or any one holding under him, the defendant may plead payment of the mortgage debt, or performance of the condition of the mortgage, and if the issue is found for the defendant, judgment shall be rendered for him; or, upon the suggestion of the defendant, the amount of the mortgage debt must be ascertained and entered of record, and if, within thirty days after the rendition of judgment, the defendant shall pay to the plaintiff, or to the clerk for his use, such debt, interest and the costs, then a writ of possession must not issue, and the clerk shall indorse upon the face of the record the fact of such payment.

2708 (2968). **Judgment by default.**—A judgment by default against a defendant is an admission of title in the plaintiff; but to recover costs against the defendant, the plaintiff must prove defendant's possession of the premises, or some part thereof, at the commencement of the suit.

Sims v. Thompson, 30 Ala. 158.

2709 (2967). **Verdict for plaintiff; what should specify.** If the verdict is for the plaintiff, it must specify whether it is for the whole or a part only of the premises, and, if for a part, must describe such part, and judgment must be rendered accordingly.

Stephens v. Westwood, 25 Ala. 716; Alexander v. Wheeler, 69 Ala. 333.

2710 (2964). **When several defendants, damages assessed severally.**—When there are more defendants than one, the jury may assess the damages arising from the detention of the land, and the injury thereto, in severalty against each defendant for distinct damages.

Bishop v. Lalouette, 67 Ala. 197.

2711 (2958). **Rent accrued after judgment recovered on motion.**—The plaintiff may have judgment against the defendant for the rent of the premises which accrues after judgment, and before the delivery of possession, by motion in the circuit court where the judgment was rendered, on ten days' notice in writing, unless the judgment is stayed by appeal and supersedeas, in which case the motion may be made after affirmance of the judgment.

Kirkland v. Trott, 75 Ala. 321.

2712 (2949). **If land recovered with growing crops, possession retained on giving bond.**—If the defendant has a crop planted or growing on the premises, and the jury find for the

plaintiff, they must also ascertain the rental value of the premises during the current year, and no writ of possession can be issued until the expiration of the year, if the defendant executes a bond in double the amount of such rent, payable to the plaintiff, with surety approved by the clerk, conditioned to pay the rent so assessed at the expiration of the year.

2713 (5950). **Effect of bond.**—The bond must be filed in the office of the clerk, and, if the rent be not paid at the expiration of the year, has the force and effect of a judgment, and thereon execution for the amount of the rent must issue against all the obligors, or such of them as may be living.

2714 (2969). **Two judgments bar further suit.**—Two judgments in favor of the defendant in an action of ejectment, or in an action in the nature of an action of ejectment, between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the land, or any part thereof, between the same parties or their privies, founded on the same title.

Jones v. DeGraffenreid, 60 Ala. 145.

2715 (2956). **When action for use and occupation sustained.**—A reasonable satisfaction may be recovered for the use and occupation of land,—

1. When there has been a demise by deed, or by parol, and no specific sum agreed on as rent.

2. When the tenant has been let into possession upon a supposed sale of the lands, which, from the act of the defendant, has not been consummated.

3. When the tenant remains on the land by the sufferance of the owner; and when after a demise the tenant, having had thirty days' previous notice, holds over without the consent of his landlord, he shall pay to such landlord double the value of the customary rent of the property so withheld.

Smith v. Houston, 16 Ala. 111; Cateline v. Spinks, Ib. 467; Tully v. Dunn, 42 Ala. 262; Crommelin v. Thiess, 31 Ala. 412; Wolffe v. Wolff, 69 Ala. 549; Fielder v. Childs, 73 Ala. 567; Stringfellow v. Curry, 76 Ala. 394.

2716 (2957). **Damages to time of verdict.**—Damages in actions for the possession, or for the use and occupation of land, must be computed to the time of the verdict.

Turnipseed v. Fitzpatrick, 75 Ala. 297.

CHAPTER 7.

THE RECOVERY OF PERSONAL PROPERTY IN SPECIE.

2717 (2942). **Writ of seizure in detinue.**—When a suit is brought for the recovery of personal chattels in specie, if the plaintiff, his agent or attorney, make affidavit that the property sued for belongs to the plaintiff, and execute a bond in such sum, and with such surety as may be approved by the clerk, with condition that if the plaintiff fail in the suit he will pay the defendant all such costs and damages as he may sustain by the wrongful complaint, it is the duty of the clerk to indorse on the summons that the sheriff is required to take the prop-

erty mentioned in the complaint into his possession, unless the defendant give bond payable to the plaintiff, with sufficient surety, in double the value of the property, with condition that if the defendant is cast in the suit he will, within thirty days thereafter, deliver the property to the plaintiff, and pay all costs and damages which may accrue from the detention thereof.

The statutory action for the recovery of chattels in specie corresponds to, lies only when, and is governed by the rules (except as otherwise provided by statute) which govern, the common law action of detinue. Hence, to support it, the plaintiff must have either a special or general property in the chattels, and the right to the immediate possession.—Cooper v. Watson, 73 Ala. 252; Seals v. Edmondson, Ib. 295; Russell v. Walker, Ib. 315; Graham v. Myers, 74 Ala. 432; Jones v. Anderson, 76 Ala. 427. **An equitable title will not support.**—Jones v. Anderson, 76 Ala. 427; Gluck v. Cox, 75 Ala. 310; Wilkinson v. Ketler, 69 Ala. 435; Collier v. Faulk, Ib. 58; Mayer v. Taylor, Ib. 403. **When prior possession will support.** Huddleston v. Huey, 73 Ala. 215; Wortham v. Gurley, 75 Ala. 356. **Can be maintained only against person in possession.**—Gilbreath v. Jones, 66 Ala. 129; Henderson v. Felts, 58 Ala. 590; Lightfoot v. Jordan, 63 Ala. 224; Street v. McClerkin, 77 Ala. 580. **One tenant in common cannot bring against another.**—Smith v. Rice, 76 Ala. 418. **Measure of damages.**—Holly v. Flournoy, 54 Ala. 99; Johnson v. Marshall, 34 Ala. 522; Wortham v. Gurley, 75 Ala. 356; Freer v. Cowles, 44 Ala. 314. **Office of affidavit.**—Jacobs v. State, 61 Ala. 448. **Damages recoverable on bond.**—Ferguson v. Barber, 24 Ala. 402; Hudson v. Young, 25 Ala. 376; Williams v. Scott, 30 Ala. 241; Savage v. Gunter, 32 Ala. 467; Miller v. Garrett, 35 Ala. 96; Mills v. Long, 58 Ala 458; Baker v. Pope, 49 Ala. 415; Foster v. Napier, 74 Ala. 393. **Verdict and judgment.**—Wittick v. Keiffer, 31 Ala. 199; Lucas v. Daniels, 34 Ala. 188; Robinson v. Richards, 45 Ala. 354; Wilson v. Barnes, 49 Ala. 134; Auerbach v. Blackman, 57 Ala. 616.

2718 (2943). **Provisions for delivery of property to parties.** If the defendant neglect for five days to give such bond, the property sued for must be delivered to the plaintiff, on his giving bond with sufficient surety, in double the value of the property, payable to the defendant, with condition to deliver the property to the defendant within thirty days after judgment, in case he fail in the suit, and to pay damages for the detention of the property and costs of suit. If the plaintiff fail to give such bond for five days after the expiration of the time allowed the defendant, the property must be returned to the defendant.

Fowler v. Banks, 21 Ala. 679; Hudson v. Young, 25 Ala. 376; Gay v. Burgess, 59 Ala. 575.

2719 (2944). **Assessment of value and damages.**—Upon the trial, the jury must, if they find for the plaintiff, assess the value of each article separately, if practicable, and also assess damages for its detention; if they find for the defendant, they must in like manner assess the value, and, if in the possession of the plaintiff, assess damages for its detention. Judgment against either party must be for the property sued for, or its alternate value, with damages for its detention to the time of trial.

Eslava v. Dillahunt, 46 Ala. 698; Jones v. Pullen, 66 Ala. 306; Averet v. Milner, 75 Ala. 505; Jones v. Anderson, 76 Ala. 427.

Jan. 7, 1883, p. 31.

2720. Suit by and between mortgagee and mortgagor.—If the suit is by a mortgagee, or by his assignee, against the mortgagor, or one holding under him, the defendant may, upon suggestion, require that the jury ascertain the amount of the mortgage debt, and such ascertainment must be entered on the record of the judgment, and the court must order that, if the debt so ascertained, interest and costs be paid within thirty days, no execution or other process shall issue on the judgment; and, on

payment thereof to the plaintiff, or to the clerk for his use, the clerk must, on the face of the record of the judgment, indorse the fact of such payment; and after such payment, the plaintiff shall be deemed the unsuccessful party within the meaning of the succeeding section.

As amended, Feb. 27, 1883, p. 34.

2721 (2945). **Failure of unsuccessful party to deliver property.**—If the unsuccessful party, who has given bond and taken the property into possession, fails, for thirty days after the judgment, to deliver the property, and to pay the damages assessed for the detention thereof, and the costs, the sheriff must upon the bond make return of the fact of such failure; and thereupon, the bond has the force and effect of a judgment, on which execution may issue against any or all the obligors therein for the alternate value of the property as assessed by the jury, the damages assessed for its detention, and the costs; if the property be delivered, and the damages assessed for its detention and the costs be not paid, the sheriff must upon the bond make return of the fact, and execution must issue against any or all of the obligors for such damages and costs, or for either, as either may be unpaid.

Wood v. Coman, 56 Ala. 283; Masterson v. Matthews, 60 Ala. 260; Rose v. Pearson, 41 Ala. 253; Garrott v. Fuller, 36 Ala. 179.

2722 (2946). **Bonds returned in ten days; penalty for neglect.**—All bonds taken under this chapter must be returned within ten days thereafter to the clerk of the court in which the suit is pending; and on failure, the sheriff is liable to the successful party to the amount of the value of the property, and the damages for its detention as assessed by the jury, with interest thereon from the rendition of the judgment, to be recovered on motion to the court in which such judgment was rendered, on three days' notice, or the sheriff may, at any time, be compelled, by attachment, to make such return.

2723 (2947). **Delivery compelled by attachment or distringas.**—Any party recovering specific property may compel its restoration, when practicable, by a writ of distringas, or moving for an attachment.*

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* On 28th February, 1887 (Pamph. Acts 1886–7, p. 131), an act was approved, by which it is provided: "That in all actions for the recovery of specific property, in any of the courts in this state, when the property sued for is in the possession of the plaintiff at the termination of the cause, and said cause is dismissed on motion of either party, or on plea in abatement, it shall be the duty of the court trying the same forthwith to impanel a jury to assess the alternate value of the property, and also the value of the hire or use thereof; and it shall be the duty of the court trying the same to render judgment against the plaintiff, and in favor of the defendant, for such property, or its alternate value, with damages for the use or hire thereof, assessed by the jury; *Provided*, That, in trials before justices of the peace and notaries public with powers of justices of the peace, it shall be the duty of such justices and notaries public to assess the alternate value of the property, and the value of the hire or use thereof."

CHAPTER 8.

DEFAMATION.

2724 (2976). **Truth of charges against public men may be proved.**—In civil actions for the publication of papers, investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence.

2725 (2977). **Truth of the words, etc., evidence under the general issue.**—In all actions of slander or libel, the truth of the words spoken or written, or the circumstances under which they were spoken or written, may be given in evidence under the general issue in mitigation of the damages.

2726 (2975). **Import of words.**—Every accusation of false swearing presumptively imports a charge of perjury, and every accusation importing the commission of a crime punishable by indictment must be held presumptively to mean what the language used ordinarily imports.

2727 (2971). **Charge of unchastity actionable.**—Any words, written, spoken, or printed, of any woman, married or unmarried, falsely imputing to her a want of chastity, are actionable without proof of special damages.

Smith v. Gaffard, 31 Ala. 45; Downing v. Wilson, 36 Ala. 717.

2728 (2972). **Retraction mitigates damages.**—The defendant in an action of slander or libel may prove, under the general issue in mitigation of damages, that the charge was made by mistake or through inadvertance, and that he has retracted the charge and offered amends before suit, by publishing an apology in a newspaper, when the charge had been thus promulgated, or verbally, in the presence of witnesses, when the accusation was verbal or written, and had offered to certify the same in writing.

Bradford v. Edwards, 32 Ala. 628.

2729 (2973). **Recantation and tender; effect of.**—If the defendant, after or before suit brought, make the recantation and amends recited in the preceding section, and also tender to the plaintiff a compensation in money, and bring the same into court, the plaintiff can recover no costs, if the jury believe and find the tender was sufficient.

2730 (2974). **Effect of tender received.**—The receipt of the money tendered, if before suit brought, is a bar to the action; if after suit, releases the defendant from all damages and costs, except the costs which accrued before the tender and receipt of the money.

CHAPTER 9.

THE TRIAL AND ITS INCIDENTS.

ARTICLE 1.—General rules of practice.
2.—Trial without jury, and demurrer to evidence.
3.—The jury and charges of court.
4.—Bill of exceptions.

ARTICLE I.

GENERAL RULES OF PRACTICE.

2731 (3011). **Trial term.**—When the summons is executed twenty days previous to the return term thereof, the cause must be placed on the trial docket, and stands for trial at that term.

Cumming v. Richards, 32 Ala. 459; Ware v. Willis, 45 Ala. 120.

2732 (3012, 3013, 3014). **Time for pleading.**—When the term of the court is but one week, the defendant must plead or demur to the complaint within the first two days; and when the term of the court is more than one week, within the first three days; other pleadings may be filed in such time as the court may direct.

Bobe v. Frowner, 18 Ala. 89; Newman v. Pryor, Ib. 186; Lang v. Waters, 47 Ala. 625.

2733 (3015). **Causes set.**—The trial causes must be set for particular days when the term of the court is more than one week, to which day the witnesses must be subpœnaed; and no cause in which the defendant has pleaded or demurred can be called for trial before the day for which it is set, except by consent.

2734 (3022). **Copy of lost pleading.**—If the original pleading be lost or withheld by any person, the court may order a copy to be filed in the place of the original.

Thomasson v. Groce, 42 Ala. 431.

2735 (3019). **Argument of counsel.**—But two attorneys can argue on a side, except by leave of the court.

2736 (3027.) **Notice to attorney; effect of.**—Written notice to the attorney of record is as effectual as notice to the party to be affected by it, and may be executed by the sheriff, whose return of service is evidence of the fact.

2737 (3020). **Nonsuits; when taken and effect of.**—Nonsuits must be taken before the jury retire, and two nonsuits, not set aside at the term at which they are suffered, or reversed on error, are equivalent to a verdict against the party suffering them.

2738 (3021). **Only two new trials granted.**—No more than two new trials can be granted the same party in any cause.

2739 (3120). **Proceedings when amount sued for or recovered less than limit of jurisdiction.**—If suit be brought on any moneyed demand for a less amount than that of which the court has jurisdiction, the suit must be dismissed; or if suit be brought for such amount, and a less sum be recovered, unless

the amount is reduced below that of which the court has jurisdiction by a set-off successfully made by the defendant, the judgment must be set aside and the suit dismissed, unless he, or some one for him, make affidavit, which must be filed in the cause, that the amount sued for is actually due, and that a recovery for the true amount was prevented by failure of proof, the interposition of the statute of limitations, or some other sufficient cause, to be judged of by the court; and in that event he must have judgment for the reduced sum.

McClure v. Lay, 30 Ala. 208; Wynn v. Simmons, 33 Ala. 272; King v. Parmer, 34 Ala. 416; Wood v. Fowler, 37 Ala. 55; Ramsey v. Strobach, 52 Ala. 513; Haws v. Morgan, 59 Ala. 508; Mills v. Long, 58 Ala. 458.

2740 (3032). **Calculation of interest, etc., on judgment by default.**—In all actions founded on any instrument of writing, ascertaining the plaintiff's demand, if judgment by default, nil dicit, or on demurrer, be rendered for the plaintiff, such judgment may be entered up by the clerk, under the direction of the court, without the intervention of a jury; and the clerk must compute the interest, and, in case of a bill of exchange, the damages, if any be due thereon.

What instruments within the statute.—McKenzie v. Clanton, 33 Ala. 528; Talladega Ins. Co. v. Woodward, 44 Ala. 287; Lenoir v. Broadhead, 50 Ala. 58; Burns v. Howard, 68 Ala. 252. **What without.**—Langdon v. Williams, 22 Ala. 681; Clarke v. Pratt, 20 Ala. 470; Amason v. Nash, 24 Ala. 279; Connoly v. Ala. & Tenn. R. R Co, 29 Ala. 373; Porter v. Burleson, 38 Ala. 343; Rhea v. Holston S. & P. Co., 59 Ala. 182; Beville v. Reese, 25 Ala. 451; Hanrick v. Farmers' Bank, 8 Port. 539; Warwick v. Brooks, 67 Ala. 252; Wagnon v. Turner, 73 Ala. 197. **Practice.**—Burt v. Hughes, 11 Ala. 571; Kennedy v. Young, 25 Ala. 563.

2741 (3025). **Dismissal in vacation.**—The plaintiff may dismiss his suit in vacation, by causing the clerk to make on the docket an entry of dismissal. When the summons has been executed, notice must be given to the defendant of the intended dismissal.

2742 (3024). **Consolidation of suits.** — Whenever two or more actions are pending at the same time, between the same parties, in the same court, and which might have been joined, the court may order them to be consolidated.

Berry v Ferguson, 58 Ala. 314.

ARTICLE II.

TRIAL WITHOUT JURY AND DEMURRER TO EVIDENCE.

2743 (3029). **Trial without jury.** — An issue of fact in a civil case may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file an agreement in writing with the clerk, waiving a jury; and in such case, the finding of the court upon the facts shall have the same effect as the verdict of a jury.

Heyman v. McBurney, 66 Ala. 511; Martin v. King, 72 Ala. 354.

2744 (3030). **Finding may be general or special.** — The finding of the court may be general or special, unless the parties, or either of them, in writing, request a special finding of the facts; if a special finding is requested, the court must state in writing the facts as it finds them, and such statement, with the judgment of the court, must be entered on the minutes.

McCarthy v. Zeigler, 67 Ala. 44.

2745 (3031). **Reservation of exceptions; revision on appeal.**—On the trial, either party may reserve, by bill of exceptions, any ruling, opinion, or decision of the court, to which an exception could have been reserved if a trial by jury had not been waived, and is entitled to an appeal from the judgment of the court, as if the judgment had been rendered on the verdict of a jury; and if the finding is special, on appeal, the supreme court must examine and determine whether the facts are sufficient to support the judgment.

McCarthy v. Zeigler, 67 Ala. 44; Betancourt v. Eberlin, 71 Ala. 461.

2746 (3103). **Demurrer to evidence; when allowed.**—In all actions upon contracts, when the testimony on both sides is written, either party may demur thereto; when the testimony on either side is parol, the opposite party, having offered no parol testimony, may also demur thereto; and the other party must be required by the court to join in the demurrer.

See citations to succeeding section.

2747 (3104). **Effect of such demurrer.**—The effect of a demurrer to evidence is an admission by the party demurring of the truth of the evidence demurred to, and of every inference and conclusion which a jury could legally deduce therefrom; and devolves on the court the determination of the issue of fact between the parties, as well as the law.

Brister v. State, 26 Ala. 107; Bryan v. State, Ib. 65; Williams v. McConnico, 27 Ala. 572; Armstrong v. Armstrong, 29 Ala. 538; Shaw v. White, 28 Ala. 637; Donaldson v. Waters, 30 Ala. 175; Bates v. Bates, 33 Ala. 102; Buffington v. Cook, 39 Ala. 64; Martin v. State, 62 Ala. 240; Curtis v. Daughdrill, 71 Ala. 590; Boyd v. Gilchrist, 15 Ala. 849; Patterson v. Blakeney, 33 Ala. 338.

2748 (3105). **Testimony written out; part of record.**—Upon a demurrer to evidence being tendered, the court must reduce the testimony to writing, or cause it to be done, which, being signed by the judge, constitutes part of the record.

2749 (3106). **Damages assessed by jury.**—If the court determine the issue for the plaintiff, a jury must be immediately impaneled to ascertain the damages, if unliquidated; or the jury, if one has been impaneled, may be required to assess the damages conditionally previous to their being discharged.

ARTICLE III.

THE JURY AND CHARGES OF COURT.

2750 (3017). **How jurors drawn.**—Jurors for the trial of civil cases are drawn, summoned, impaneled and sworn as directed by the provisions of chapter 4, title 3, part 5.

2751 (3016). **Challenges.**—Each party has the right to challenge four of the jury peremptorily.

2752 (3018). **Struck jury.**—In all actions triable by jury, either party may demand a struck jury, and must thereupon be furnished by the sheriff with a list of twenty-four jurors in attendance upon the court, from which a jury must be obtained by the parties or their attorneys alternately striking one from the list until twelve are stricken off, the party demanding the jury commencing; and the jury thus obtained must not be chal-

lenged for any cause, except bias or interest as to the particular case.

McArthur v. Carrie, 32 Ala. 75; Dothard v. Denson, 72 Ala. 541; M. & E. R. R. Co. v. Thompson, 77 Ala. 448.

2753 (3026). **When state, county, or city interested, citizens competent jurors.**—In actions to which the state, or a county, or a city or town, is a party, or has an interest, citizens of the state, county, city, or town, are not disqualified by reason of interest.

2754 (3028). **Charge of court.**—The court may state to the jury the law of the case, and may also state the evidence when the same is disputed, but shall not charge upon the effect of the testimony, unless required to do so by one of the parties.

Principles governing the giving or refusal of general charge on effect of evidence. Freeman v. Scurlock, 27 Ala. 407; Lawler v. Norris, 28 Ala. 675; Allman v. Gann, 29 Ala. 240; Crum v. Williams, Ib. 446; Williams v. Hartshorn, 30 Ala. 211; White v. Hass, 32 Ala. 430; Robinson v. Brooks, Ib. 222; Drake v. Flewellen, 33 Ala. 106; Weil v. State, 52 Ala. 19; Sanders v. State, 58 Ala. 371; Schmidt v. Joseph, 65 Ala. 475. Smoot v. M. & M. R. R. Co., 67 Ala. 13; Scarborough v. Malone, Ib. 570; Tyree v. Lyon, Ib. 1; Greene v. State, 68 Ala. 539; Ins. Co. v. Felrath, 77 Ala. 194; Seals v. Holloway, 77 Ala. 344; Davidson v. State, 63 Ala. 432; Tuttle v. Walker, 69 Ala. 172. **General charge without request erroneous.**—English v. McNair, 34 Ala. 40; Baker v. Russell, 41 Ala. 279; Edgar v. State, 43 Ala. 312; Foster v. State, 47 Ala. 643; Belisle v. Clark, 49 Ala. 98; Beasley v. State, 50 Ala. 149; Dugger v. Tayloe, 46 Ala. 320; Crawford v. McLeod, 64 Ala. 240. **The power given the court to state the evidence when the same is disputed,** is not a limitation, but an enlargement of its inherent power.—Tidwell v. State, 70 Ala. 33.

2755 (3110). **When charge must be in writing.**—In all civil and criminal cases, the judge must charge the jury in writing, if the charge is required to be so given by either party, and notice of such requisition is given after the testimony is closed, and before the argument to the jury is commenced.

2756 (3109). **Charges moved for by the parties.**—Charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written; and it is the duty of the judge to write "given" or "refused," as the case may be, on the document, and sign his name thereto; which thereby becomes a part of the record, and may be taken by the jury with them on retirement.

"Must be given or refused in the terms in which they are written."—Ivey v. Phifer, 11 Ala. 535, Clealand v. Walker, Ib. 1059; Phillips v. Beene, 16 Ala. 721; Bell v. Troy, 35 Ala. 186; Polly v. McCall, 37 Ala. 21; Edgar v. State, 43 Ala. 45; Lyon v. Kent, 45 Ala. 656; Milner v. Wilson, Ib. 478; Knight v. Clements, Ib. 89; Warren v. State, 46 Ala. 549; Bush v. Glover, 47 Ala. 167; Sawyer v. Lorillard, 48 Ala. 332; Baker v. State, 49 Ala. 351; Cunningham v. State, 73 Ala. 53; E. T., V. & G. R. R. Co. v. Bayliss, 77 Ala. 430. **"Given" or "refused" to be indorsed, etc.**—Little v. State, 58 Ala. 265; Tyree v. Parham, 66 Ala. 424; Mobile Savings Bank v. Fry, 69 Ala. 348; Allen v. State, 74 Ala. 557; Holley v. State, 75 Ala. 14. **Become part of the record.**—Tuskaloosa County v. Logan, 50 Ala. 503; Mobile Savings Bank v. Fry, 69 Ala. 348; Pearce v. Clements, 73 Ala. 256. **Error to refuse to permit jury to take with them charges given.**—Miller v. Hampton, 37 Ala. 342. **Right of jury to take with them charges refused.**—Beard v. Ryan, 78 Ala. 37.

2757 (3023). **Jury take out written evidence.**—All instruments of evidence, and depositions read to the jury may be taken out by them on their retirement.

ARTICLE IV.

BILL OF EXCEPTIONS.

2758 (3107). **Bill of exceptions taken during trial.**—Either of the parties in any civil case, during the trial of the cause, may reserve by bill of exceptions any charge, opinion, or decision of the court touching the cause of action, which would not otherwise appear of record.

Office of bill of exceptions.—Petty v. Dill, 53 Ala. 641; Young v. O'Neal, 57 Ala. 566; Weems v. Weems, 69 Ala. 104; Diggs v. State, 77 Ala. 68; Baker v. Keith, Ib. 544. **Rulings which are part of record proper, not revisable on bill.**—Young v. O'Neal, 57 Ala. 566; Hunter v. Wood, 54 Ala. 71; Diggs v. State, 77 Ala. 68; Baker v. Keith, Ib. 544; Gray v. State, 63 Ala. 67; Ex parte Knight, 61 Ala. 589; Sternau v. Marx, 58 Ala. 608; Morgan v. Wing, Ib. 301; Sivoly v. Scott, 56 Ala. 555; Buckley v. Wilson, Ib. 393; Petty v. Dill, 53 Ala. 641. **When bill necessary.** In attachment, the refusal of the primary court to allow third persons to intervene as parties, is not revisable unless reserved by bill.—McAbee v. Parker, 78 Ala. 537. Nor is refusal of application for change of venue in criminal case.—Jones v. State, 77 Ala. 98. Nor refusal to allow amendment to plea.—Bright v. State, 76 Ala. 96. Nor decision on facts.—Jaques v. Horton, 76 Ala. 240; Tapp v. Cox, 56 Ala. 553; Smith v. King, 22 Ala. 558; Williams v. Gunter, 28 Ala. 681. Nor conduct of counsel on trial.—Cross v. State, 68 Ala. 476. **Signature of judge essential.**—Alford v. Eubank, 44 Ala. 276; Haden v. Brown, 22 Ala. 572; Southern Ex. Co. v. Black, 54 Ala. 177; Rollater v. Rollater, 52 Ala. 111; Kerley v. Vann, Ib. 7; Small v. McCalley, 51 Ala. 527; Kirby v. Vann, Ib. 221. **When should be signed.**—Blake v. Harlan, 75 Ala. 616; Ex parte Mayfield, 63 Ala. 203; Ex parte Nelson, 62 Ala. 376. **Must be signed by presiding judge.**—Ex parte Nelson, 62 Ala. 376. **Power of court over bill after adjournment.**—Chapman v. Holding, 54 Ala. 61; Dudley v. Chilton Co., 66 Ala. 593; Posey v. Beale, 69 Ala. 32. **Bill controls when there is a conflict between it and record proper.**—Vincent v. Rogers, 30 Ala. 471; Davidson v. Street, 34 Ala. 125; McDonald v. Jacobs, 77 Ala. 524; Hurst v. Bell, 72 Ala. 336; Reynolds v. State, 68 Ala. 502. **Making documents parts of bill by reference.**—Tuskaloosa Co. v. Logan, 50 Ala. 503; Parsons v. Woodward, 73 Ala. 348; Pearce v. Clements, Ib. 256; Farmer v. Wilson, 34 Ala. 75; Garlington v. Jones, 37 Ala. 240; Moore v. Helms, 77 Ala. 379. **When exceptions should be taken.**—City Council v. Gilman, 33 Ala. 116; Croft v. Ferrell, 21 Ala. 351; Reynolds v. State, 68 Ala. 502; Bynum v. S. Pipe & Pump Co., 63 Ala. 462. **Statement of facts.**—Carter v. Doe, 21 Ala. 72; Sackett v. McCord, 23 Ala. 851; Tyree v. Parham, 66 Ala. 432; Morris v. State, 25 Ala. 57; Floyd v. State, 30 Ala. 511. **Statement as to all the evidence.** Alexander v. Wheeler, 69 Ala. 332; Walker v. Carroll, 65 Ala. 61 (overruling Kirksey v. Hardaway, 41 Ala. 330, and Bridges v. Cribbs, Ib. 367); Griggs v. State, 58 Ala. 425. **Presumption when evidence not set out.**—Doe v. Godwin, 30 Ala. 242; Fleming v. Ussery, Ib. 282. **Suggestions as to frame of bill.**—Smith v. State, 68 Ala. 424; Tyree v. Parham, 66 Ala. 424. **Sufficiency of exceptions to charges.** McGehee v. State, 52 Ala. 224; Jacobson v. State, 55 Ala. 151; Lehman v. Bibb, Ib. 411; Stroud v. State, Ib. 77; Caldwell v. Parmer, 56 Ala. 405; S. & N. R. R. Co. v. Jones, Ib. 507; Mayberry v. Leach, 58 Ala. 339; Beavers v. Hardie, 59 Ala. 570; S. & N. R. R. Co. v. Sullivan, Ib. 272; Howe Mfg. Co. v. Ashley, 60 Ala. 496; Chapman v. Holding, Ib. 523; Bernstein v. Humes, Ib. 582; Hardin v. State, 63 Ala. 39; Mayor v. Rumsey, Ib. 352; Gray v. State, Ib. 67; Kilpatrick v. Pickens Co., 66 Ala. 442; Williams v. State, 68 Ala. 552; Dickey v. State, Ib. 508; Smith v. Sweeney, 69 Ala. 524; Farley v. State, 72 Ala. 170; Stovall v. Fowler, Ib. 77; Sharp v. Robertson, 76 Ala. 344; Woods v. State, Ib. 35; Bedwell v. Bedwell, 77 Ala. 587; Johnson v. Allen, 78 Ala. 387; Bernstein v. Humes, Ib. 134. **Exception cannot be based on ruling induced by excepting party.**—Shelton v. State, 73 Ala. 5; Leonard v. State, 66 Ala, 461; DeArman v. State, 78 Ala. 10. **Exceptions to evidence.**—Bynum v. S. Pipe & Pump Co., 63 Ala. 462; Boswell v. State, Ib. 307. **Bill construed most strongly against excepting party.**—Patton v. Hayter, 15 Ala. 18; Donnell v. Jones, 17 Ala. 689; Perminter v. Kelly, 18 Ala. 716; Andress v. Broughton, 21 Ala. 200; Sheldon v. St. Clair, 64 Ala. 565; Massey v. Smith, 73 Ala. 173. **Charges construed with reference to the evidence.**—Waters v. Spencer, 22 Ala. 460; Berry v. Hardman, 12 Ala. 604; Miller v. Jones, 29 Ala. 174; Ivey v. Owens, 28 Ala. 642; Kirkland v. Oates, 25 Ala. 465; Fulton v. Goodman, 32 Ala. 108. **Also with reference to question presented.**—Lockwood v. Nelson, 16 Ala. 295. **When mandamus will not lie to compel insertion of clause in bill.**—Ex parte Huckabee, 71 Ala. 626. **Motion to suppress or strike from the record.**—Ryan v. Kilpatrick, 66 Ala. 332; Weir v. Hoss, 6 Ala. 881.

2759 (3112). **Plaintiff suffering nonsuit may take bill of exceptions.**—When, from any decision of the court on the trial

of a cause, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, or decision may be reserved for the decision of the supreme court by bill of exceptions, as in other cases.

When statute applies; rulings revisable under.—Blackburn v. Minter, 22 Ala. 613; Douglass v. M. & W. P. R. R. Co., 37 Ala. 638; Hubbard v. Baker, 48 Ala. 491; Wood v. Coman, 56 Ala. 283. **When nonsuit voluntary; ruling not revisable.**—Darden v. James, 48 Ala. 33; Welch v. Mayor, Ib. 291; Paulling v. Marshall, 47 Ala. 270; Amerson v. M. & M. R. R. Co. 50 Ala. 497; Rogers v. Jones, 51 Ala. 353; Mathis v. Oates, 57 Ala. 112; Hurst v. Bell, 72 Ala. 336; Perry v. Danner, 74 Ala. 485. **Only such rulings as are properly reserved revisable.**—Vincent v. Rogers, 30 Ala. 471; Wyatt v. Evins, 52 Ala. 285. **Bill of exceptions necessary.**—Palmer v. Bice, 28 Ala. 430. **When sufficiently shown that nonsuit was taken on account of adverse ruling.**—Downs v. Minchew, 30 Ala. 86. **When not.** Tate v. McCrary, 21 Ala. 499.

2760 (3108). **Bill to state point excepted to; if correct must be signed.**—The bill must be tendered by the party supposing himself aggrieved, stating the point, charge, opinion, or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible; and if correctly stated, it is the duty of the presiding judge to sign the same, which thereby becomes a part of the record.

See citations to section 2758.

2761 (3113). **When bill signed.**—No bill of exceptions can be signed after the adjournment of the court during which the exception was taken, unless by consent or agreement of counsel in writing, except in such cases as is otherwise provided.

Kitchen v. Moye, 17 Ala. 143; Cox v. Whitfield, 18 Ala. 738; Haden v. Brown, 22 Ala. 572; Bryant v. State, 36 Ala. 270; Union Co. v. Mitchell, 37 Ala. 314; Maddox v. Broyles, 42 Ala. 436; Alford v. Eubank, 44 Ala. 276; Stephens v. State, 47 Ala. 696; Ryall v. Maix, 48 Ala. 537; Hollingsworth v. Chapman, 50 Ala. 23; Ex parte Mayfield, 63 Ala. 203; Ex parte Nelson, 62 Ala. 376; Blake v. Harlan, 75 Ala. 616.

2762 (3111). **Refusal to sign bill; establishment of in supreme court.**—If the judge fail or refuse to sign a bill of exceptions, the point or decision and the facts being truly stated, he is guilty of a high misdemeanor in office; and the supreme court must receive such evidence of the facts as may be deemed by it satisfactory, and proceed to hear the cause as if the bill had been signed by the court.*

Haden v. Brown, 22 Ala. 572; Stein v. McArdle, 25 Ala. 561; Garlington v. Jones, 37 Ala. 240; Strawbridge v. State, 48 Ala. 308; Tuskaloosa Co. v. Logan, 50 Ala. 504; Posey v. Beale, 69 Ala. 32; Blake v. Harlan, 75 Ala. 205; Judge v. State, 58 Ala. 402.

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*On 22d February, 1887 (Pamph. Acts 1886–7, p. 126), an act was approved entitled "An act to regulate the signing and allowance of bills of exceptions," which is as follows:

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That in all cases where bills of exceptions are authorized, the court, in term time, may, on the application of either party, fix the time in which the bill of exceptions shall be signed, and the judge, in vacation, may, for good cause, extend the time fixed in term time; *Provided*, In no case shall the time allowed exceed six months; *And provided further*, That nothing herein contained shall prevent parties from agreeing as to time, as now provided by law.

"SEC. 2. *Be it further enacted*, That whenever any judge dies, resigns, or [his] term of office expires, [or he] is impeached, or from other good cause fails to sign any bill of exceptions duly presented to him within the time agreed by the parties, or fixed by the order of the court, or the judge, as provided by section one of this act, the bill of exceptions may be established in the supreme court, as now provided by law when a judge improperly refuses to sign a proper bill of exceptions."

CHAPTER 10.

EVIDENCE.

ARTICLE 1.—General rules.
2.—Procuring testimony by subpœna.
3.—Procuring testimony by deposition.
4.—Examination of parties by interrogatories.
5.—Perpetuating testimony.

ARTICLE I.

GENERAL RULES.

2763 (3057). **Testimony; how given.**—All testimony, except as otherwise directed, must be given in open court on the oath or affirmation of the witness.

Garrett v. Bruner, 59 Ala. 513.

2764 (3034). **Interpreters.**—Interpreters may be sworn truly to interpret, when necessary, and must be paid as witnesses in the cause.

2765 (3058). **Competency of parties as affected by interest.** In civil suits and proceedings, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that neither party shall be allowed to testify against the other as to any transaction with, or statement by any deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the opposite party.

Statute not violative of any constitutional provision.—Walthall v. Walthall, 42 Ala. 450 **General competency of parties.**—Goolsbee v. Fordham, 49 Ala. 202; Lemay v. Walker, 62 Ala. 39; Bogia v. Darden, 45 Ala. 269; Rupert v. Elston, 35 Ala. 79; Davis v. Tarver, 65 Ala. 98; O'Neal v. Reynolds, 42 Ala. 197. **Legatee or devisee competent as attesting witness to will.**—Kumpe v. Coons, 63 Ala. 448; Connoly v. Gayle, 61 Ala. 116; Barker v. Bell, 46 Ala. 216. **Husband and wife; competency as witnesses for each other.**—Robison v. Robison, 44 Ala. 227; Lang v. Waters, 47 Ala. 624; Rowland v. Plummer, 50 Ala. 183; Sumner v. Cooke, 51 Ala. 521; Chapman v. Holding, 60 Ala. 522; Miller v. King, 67 Ala. 576; Gordon v. Tweedy, 71 Ala. 202. **Exception to competency of parties construed.**—Ala. Gold Life Ins. Co. v. Sledge, 62 Ala. 566; Goodlett v. Kelly, 74 Ala. 213; Waldman v. Crommelin, 46 Ala. 580; Kirksey v. Kirksey, 41 Ala. 626; Stuckey v. Bellah, Ib. 701; Davidson v. Rothschild, 49 Ala. 104; Junkins v. Lovelace, 72 Ala. 303; Bragg v. Clark, 50 Ala. 363; Key v. Jones, 52 Ala. 238; Avery v. Avery, 49 Ala. 193; Baldwin v. Ashby, 54 Ala. 82; Binford v. Dement, 72 Ala. 491; Daily v. Daily, 66 Ala. 266; Lilly v. Larkin, Ib. 110; Killen v. Lide, 65 Ala. 505; Smith v. Bryant, 60 Ala. 235; Huckabee v. Nelson, 54 Ala. 12; Frazier v. Parks, 56 Ala. 363; Strange v. Graham, Ib. 614; Miller v. Clay, 57 Ala. 162; Tisdale v. Maxwell, 58 Ala. 40; Beadle v. Graham, 66 Ala. 99; s. c., Ib. 102; Dismukes v. Folsom, 67 Ala. 386; Fort v. Davis, Ib. 481; Stallings v. Hinson, 49 Ala. 92; Wood v. Brewer, 73 Ala. 259; Skinner v. Chapman, 78 Ala. 376; Meadows v. Meadows, Ib. 240. **Persons included within the exception.**—Hendricks v. Kelly, 64 Ala. 388; Jackson v. Clopton, 66 Ala. 129; Boykin v. Smith, 65 Ala. 294; Drew v. Simmons, 58 Ala. 463; Mc Crary v. Rash, 60 Ala. 374; Dunlap v. Mobley, 71 Ala. 102; Keel v. Larkin, 72 Ala. 493; McDonald v. Jones, 77 Ala. 524; Lewis v. Easton, 50 Ala. 470; Fort v. Davis, 67 Ala. 481. **Party cannot testify to secret intention.**—Oxford Iron Co. v. Spadley, 51 Ala. 171; Burke v. State, 71 Ala. 377. **Testimony of parties subjected to same tests as other witnesses.**—Wise v. Falkner, 51 Ala. 359; Broadhead v. Jones, 39 Ala.

96. "**Unless called to testify thereto by the opposite party.**"—Thomas v. Thomas, 42 Ala. 120; Dudley v. Steele, 71 Ala. 423.

Feb. 23, 1883, p. 146.

2766. Competency of witness as affected by conviction for crime.—No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury; but if he has been convicted of other infamous crime, the objection goes to his credibility.

2767 (3059). **Proof of usury by representative.**—When the borrower is dead, and usury is relied on as a defense, the representative of the borrower, having given ten days' notice to the plaintiff, or his attorney, of his intention to do so, is a competent witness to prove the usury, by swearing that he believes the contract to be usurious, if the plaintiff was the lender, unless the plaintiff denies on oath, in open court, the truth of the facts proposed to be sworn to by the defendant.

2768 (550). **Oaths without state in commencement or progress of suit.**—Affidavits required in the commencement or progress of any suit or judicial proceedings may be taken without this state before any commissioner appointed by the governor of this state, any judge or clerk of a federal court, or judge of any court of record, or notary public, who shall certify under their hands, and seals of office, if any.

2769 (3035). **Written contract sued on; effect of as evidence; consideration, how impeached.**—Every written contract, the foundation of the suit, purporting to be executed by the party sought to be charged, his partner, agent, or attorney in fact, is evidence of the existence of the debt, or that the party undertook to perform the duty for which it was given, and that it was made on sufficient consideration; but may be impeached by plea, and, when so impeached, the burden of proof is on the defendant.

Holman v. Bank of Norfolk, 12 Ala. 370; Cowan v. Cooper, 41 Ala. 187; Hill v. Nichols, 50 Ala. 336; Bolling v. Munchus, 65 Ala. 558.

2770 (3036). **Execution of instruments purporting to be signed by defendant impeached by sworn plea.**—Every written instrument, the foundation of the suit, purporting to be signed by the defendant, his partner, agent, or attorney in fact, must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit; and every assignment of such instrument, on which suit is brought in the name of the assignee, must be deemed genuine, unless impeached in like manner, when, in either case, the burden of proof is cast on the plaintiff.

Shackelford v. King, 24 Ala. 159; Ala. & Miss. R. R. Co. v. Sanford, 36 Ala. 703; Hooper v. Strahan, 71 Ala. 75; Bonner v. Young, 68 Ala. 35; Wimberly v. Dallas, 52 Ala. 196; Garrett v. Garrett, 64 Ala. 263; Ala. Coal Mining Co. v. Brainard, 35 Ala. 476; Meyer v. Mitchell, 75 Ala. 476; Broadhead v. Jones, 39 Ala. 96; McCoy v. Harrell, 40 Ala. 232; Kirksey v. Kirksey, 41 Ala. 626; Ala. & Fla. R. R. Co. v. Watson, 42 Ala. 74; Berry v. Ferguson, 58 Ala. 314; Oxford Iron Co. v. Spradley, 46 Ala. 98; Preston v. Dunham, 52 Ala. 217; Wood v. Brewer, 66 Ala. 570; Rich v. Thornton, 69 Ala. 473; Goetter v. Head, 70 Ala. 532; Guice v. Thornton, 76 Ala. 466; Barclift v. Treece, 77 Ala. 528; Ladega Saw Mill Co. v. Smith, 78 Ala. 108; Smith v. Harrison, 33 Ala. 706; Wood v. Brewer, 66 Ala. 570; Palmer v. Scott, 68 Ala. 380.

2771 (3037). **Same, when offered under a plea in bar.** It is not necessary to prove the execution or assignment of any instrument offered in evidence under the plea of set-off, or other

plea in bar, unless the plaintiff put the execution or assignment thereof in issue by a replication verified by affidavit.

Walker v. Bentley 64 Ala. 92.

2772 (3038). **When proof of partnership not required.** When suit is brought by partners, the plaintiff must not be required to prove the existence of the firm, or the individuals composing it, unless the same is denied by plea verified by affidavit.

Moore v. Burns, 60 Ala. 269.

2773. When sworn account admissible in evidence. Jan. 16, 1879, p. 154. In all suits upon accounts, an itemized statement of the account, verified by the affidavit of a competent witness, taken before, and certified by an officer having authority under the laws of this state to take and certify affidavits, is competent evidence of the correctness of the account, if the plaintiff, at the time of bringing his suit, indorses on the summons and complaint, or other original process, the fact that the account is verified by affidavit, unless the defendant, within the time allowed him for pleading, files in the cause an affidavit denying, on information and belief, the correctness of the account.

2774 (3039). **Effect of written releases and receipts.**—All receipts, releases and discharges in writing, whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties thereto.

Carroll v. Corbett, 57 Ala. 579; Smith v. Gayle, 58 Ala. 600; Cowan v. Sapp, 74 Ala. 44.

2775 (3040). **Written composition or settlement of debts.** All settlements in writing, made in good faith for the composition of debts, must be taken as evidence, and held to operate according to the intention of the parties, though no release under seal is given, and no new consideration has passed.

Hart v. Freeman, 42 Ala. 567; Motley v. Motley, 45 Ala. 555; McArthur v. Dane, 61 Ala. 539; Singleton v. Thomas, 73 Ala. 205.

2776 (3041). **Justification under process regular on its face.**—Whenever it appears that the process is regular on its face, and is issued by competent authority, a sheriff or other ministerial officer is justified in the execution of the same, whatever may be the defect in the proceeding on which it was issued.

Wilson v. Sawyer, 37 Ala. 631; Murphy v. State, 55 Ala. 252; Martin v. Hall, 70 Ala. 421; Meyer v. Hearst, 75 Ala. 390; Clark v. Lamb, 76 Ala. 496.

2777 (3053). **Entry on physician's book; effect of as evidence.**—The original entries in the books of a physician are evidence for him in all actions brought for the recovery of his medical services, that the services were rendered, unless the defendant in open court deny on oath the truth of such entries; but the physician is required to prove the value of such services. When the denial is by a legal representative of the party, it is sufficient for him to swear that he believes the entries to be untrue.

Richardson v. Dorman, 28 Ala. 679; Halliday v. Butt, 40 Ala. 178; Weaver v. Morgan, 49 Ala. 142.

2778 (3054). **Entries or memoranda made by deceased representative, guardian, or trustee.**—Books of account kept by a deceased executor, administrator, guardian, or trustee, or en-

tries or memoranda made by him in the course of business or duty, are admissible evidence; and if such book or memoranda be lost, a copy thereof, supported by the oath of the person making it, is admissible evidence.

2779 (3055). **Prices current evidence of value of articles.** Prices current and commercial lists, printed at any commercial mart, are presumptive evidence of the value of any article of merchandise specified therein, at that place, at the date thereof, and of the rate of exchange between that and other places; also of the rates of insurance, freights, and the times of arrival and departure of ships and other vessels.

2780 (3056). **Registers of marriages, births and deaths as evidence.**—Registers of marriages, births and deaths, kept in pursuance of law, or any rule of a church or religious society, may be certified by the custodian thereof; and, when so certified, are presumptive evidence of the facts therein stated, as well as of the law or rule in pursuance of which such registry was made, and of the authority to certify the same.

2781 (3052). **Patents.**—Patents issued by the United States, or any state of the United States, must be received in evidence without further proof.

Bates v. Herron, 35 Ala. 117.

2782 (3043). **Certificates of registers of land-office vest title and received in evidence.**—All certificates issued pursuant to any act of congress by any board of commissioners, register of a land-office, or by any one authorized by law to issue such certificate, upon any warrant or order of survey, or for any donation or pre-emption claim, vest the legal title in the holder, or his assignee, and must be received as evidence of such title; and all transcripts of any official book, official entry, or other document pertaining to any land-office in this state, certified by the register of such land-office, must be received as prima facie evidence of the facts contained in such transcripts so certified, in all the courts of this state.

Stewart v. Trenier, 49 Ala. 493; Bonner v. Phillips, 77 Ala. 427.

2783 (3044). **Deeds made and signed in land-office; how proved.**—Any deed or written instrument for the conveyance or sale of land purchased or entered at any land-office of the United States in this state, made or signed in or upon any book or record of such office, may be proved by a copy thereof, certified by the register of such land-office under his hand to be a correct copy, and such copy shall be received in all courts and proceedings under the laws of this state, and may be recorded in the office of the judge of probate of the county in which the land may be; and a transcript of such record in the office of the judge of probate may be certified and used in the same manner, and in the same cases as transcripts of such records of original deeds may be.

2784 (3048). **Books, etc., of surveyor-general public archives; certified copies evidence.**—The books, maps and field-notes of the surveyor-general of the United States for the State of Alabama, deposited in the office of the secretary of state, are public archives of the state; and the secretary of state must, upon the application of any person, furnish certified copies, which must be received in evidence in any court.

2785 (3049). **Transcripts of books kept in office of secretary of state or auditor, evidence.**—All transcripts of books or papers required by law to be kept in the office of the secretary of state, or the office of the auditor, when certified by the proper custodian thereof, must be received in evidence in all courts; and it is no objection to such transcript that the book from which it is taken is a copy of office books belonging to the United States.

2786 (3050). **Copy of field-notes certified by judge of probate, evidence.**—Copies of the field-notes of the original government surveys of lands, furnished by the secretary of state to the judge of probate, when certified by such judge, are admissible in evidence in any court of this state.

2787 (3046). **Certificate of head of department sufficient.** The certificate of the head of any bureau or department of the general government is sufficient authentication of any paper or document appertaining to his office.

2788 (3047). **Copies of official bonds, etc., required by law to be kept by any officer, are evidence.**—Copies of official bonds, or other instruments or papers, required to be kept by any officer of this state, and transcripts from the books and proceedings required to be kept by any sworn officer of the state, are presumptive evidence in any civil cause, and have the same effect as if the original were produced and proved, upon the certificate of the custodian thereof that it is a true copy of the original; but the court may, on motion, require production of the original, if practicable, when necessary to promote the ends of justice.

Monts v. Stephens, 43 Ala. 217; Dudley v. Chilton County, 66 Ala. 593.

2789 (3051). **Private acts.**—All private acts of the general assembly of this or any other state of the United States may be given in evidence without being specially pleaded.

Perry v. N. O., M. & C. R. R. Co., 55 Ala. 413; McDonald v. Mobile Life Ins. Co., 56 Ala. 468.

2790 (3045). **Statutes of other states.**—Transcripts of acts of congress, or of the statutes of any other state or territory of the United States, certified by the secretary of state of this state as being deposited in his office, and public or private statutes, or the proceedings of any legislative body, purporting on the face of the book to be printed by authority of the government, or state, or territory, are evidence without further proof.

Clanton v. Barnes, 50 Ala. 261; Blackman v. Dowling, 57 Ala. 78; Bradley v. Northern Bank, 60 Ala. 252; Johnson v. State, 73 Ala. 484; Bush v. Garner, Ib. 168.

2791 (3042). **Interest in other states.**—The secretary of state must cause to be printed, in the pamphlet acts of each session of the general assembly, the rate of interest of each state and territory; and such publication must be received as presumptive evidence of such interest.

Clarke v. Pratt, 20 Ala. 470; Harrison v. Harrison, Ib. 629.

ARTICLE II.

PROCURING TESTIMONY BY SUBPŒNA.

2792 (3060). **Issue of subpœna.**—At the request of either party to a pending suit, his agent or attorney, the clerk of the court must issue subpœnas for witnesses, specifying therein the time and place for their appearance, the title of the suit, and the party at whose instance they are summoned, and commanding them to appear in conformity therewith and give testimony.

2793 (3061). **When affidavit required for subpœna.**—No subpœna can issue for a witness residing more than one hundred miles from the place of trial, computing by the route usually traveled, unless the party summoning him, his agent, or attorney, make affidavit that the personal attendance of the witness is necessary to a proper decision of the cause, and that his deposition would be insufficient for that purpose; and the fact that such affidavit has been made must be indorsed by the clerk upon the subpœna.

2794 (3062). **How and by whom executed.**—The subpœna must be directed "to any sheriff of the State of Alabama," and may be executed upon the witness either personally or by leaving a copy at his place of residence, unless the subpœna is issued during term time, when it must be executed by personal service.

2795 (3063). **Issued to each term.**—In civil cases, where the cause is not decided at the first term, witnesses must be summoned by the clerk by the issue of subpœnas to each term until the case is disposed of, unless otherwise directed by the party summoning them.

2796 (3064). **Penalty for default.**—Any witness who, after being subpœnaed, fails to attend pursuant to the mandate of the subpœna, and remain until his testimony is given, or he is discharged, forfeits one hundred dollars to the use of the party summoning him.

Maclin v. Wilson, 21 Ala. 670.

2797 (3065). **Proceedings to recover penalty.**—A conditional judgment must, on motion of such party, be rendered against such witness, and a notice issued to him that such judgment will be made absolute unless he appear at the next court and render a good excuse for his default; and on being personally served with a copy of such notice ten days before the next or any succeeding term, if he fail to appear and render a satisfactory excuse for his default, such judgment may be made absolute, or reduced, as the court may direct.

Maclin v. Wilson, 21 Ala. 670; Emanuel v. Ketchum, Ib. 258; Spence v. Simmons, Ib. 563.

2798 (3068). **Excuse; how made.**—Witnesses failing to attend court may make their excuse by affidavit, or viva voce, in open court, which the court must hear at any time, unless engaged in the trial of a cause, and, if the excuse is sufficient, release the party from any fine imposed, without payment of costs.

2799 (3066). **Witness imprisoned for refusal to testify.** Any witness refusing to testify, unless privileged by law from testifying in the cause, must be committed to the jail of the

county, there to remain without bail until he consents to testify.

2800 (3067). **Discharged on bond.**—No witness so imprisoned must be discharged at the adjournment of the court, or afterwards, until he give bond and surety in an amount to be prescribed by the judge of such court, to be approved by the judge of probate, payable to the state, and conditioned to appear at the next term and give evidence in the cause.

ARTICLE III.

PROCURING TESTIMONY BY DEPOSITION.

2801 (3069). **When deposition may be taken.**—The evidence of witnesses in civil cases may be taken by deposition by either party,—

1. When the witness is a woman.*
2. When the witness, from age, infirmity, or sickness, is unable to attend court.
3. When the witness resides more than one hundred miles from the place of trial, computing by the route usually traveled, or resides out of, or is absent from the state.
4. When the witness is about to leave the state, and will probably not return until after the trial.
5. When the claim or defense, or a material part thereof, depends exclusively on the evidence of the witness.
6. When the witness is the governor, treasurer, auditor, chancellor, judge, or clerk of any court of record, register in chancery, or sheriff; or president, director, or other officer of a bank incorporated in this state; postmaster, or other officer of the United States; or practicing physician or lawyer; or a person constantly employed on any steamboat or other water-craft, or on any turnpike, or manufactory, or about the engine or other machinery of a railroad, or is a superintendent, secretary, treasurer, master of road repairs, or conductor of any railroad; or is a telegraph operator; or a teacher of a public or private school actually engaged in teaching, or a minister of the gospel, or pastor of a religious society in charge of any diocese, parish, church, district, or circuit.

Subdivision 2.—Herndon v. Givins, 16 Ala. 261. **Subdivision 5.**—May v. May, 28 Ala. 141; Henry v. Northern Bank, 63 Ala. 527; M. & C. R. R. Co. v. Maples, Ib. 601.

2802 (3070). **Steps to be taken before issue of commission.** The party desiring to take such deposition, his agent, or attorney, must make affidavit before the clerk of the court, or any officer authorized to administer oaths, setting forth some one or more of the above causes for taking such deposition, and that the witness is material, which must be filed in the cause; and thereupon the clerk must issue a commission to one or more persons to take such deposition, and prescribe the notice to be given the opposite party, or his attorney, of the time and place of taking it. If the party on whom the notice is to be served resides out of the county, and has no attorney of record, it is sufficient to file the notice with the papers in the cause for

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* "Woman" substituted for "female" by joint committee.

the length of time prescribed. When the testimony is desired under the third subdivision of the preceding section, the testimony must be taken by interrogatories, as prescribed by the succeeding section.

Affidavit.—Bogia v. Darden, 45 Ala. 269; Reese v. Beck, 24 Ala. 651: Wolfe v. Parham, 18 Ala. 441; Parsons v. Boyd, 20 Ala. 112; McDonald v. Jacobs, 77 Ala. 524. **Notice.**—Reese v. Beck, 24 Ala. 651; Jordan v. Hazard, 10 Ala. 221; Cameron v. Clark, 11 Ala. 259; Garnett v. Yoe, 17 Ala. 74; Oxford Iron Co. v. Quinchett, 44 Ala. 487.

2803 (3071). **Interrogatories may be filed; notice.**—The party, after making affidavit, may file with the clerk interrogatories to be propounded to the witness, of which, and of the residence of the witness, and of the commissioner to be appointed, he must give the opposite party, or his attorney, notice in writing, who has ten days thereafter to file cross interrogatories, to which the party filing the interrogatories may file rebutting interrogatories. After the expiration of the ten days, a commission, accompanied by a copy of the interrogatories and of the cross and rebutting interrogatories, if filed, must be issued by the clerk to take the deposition, which may be taken at such time and place as the commissioner shall appoint. On failure to give the notice herein required of the residence of the witness and the commissioner, unless the same is waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it.

Notice.—Reese v. Beck, 24 Ala. 651; Aicardi v. Strang, 38 Ala. 326; Cornelius v. Partain, 39 Ala. 473.

2804 (3072). **Notice when party resides out of county.**—If the party, to whom notice is to be given under the provisions of the preceding section, resides out of, or is absent from, and has no attorney of record within the county, notice may be given by filing the interrogatories in the office of the clerk for ten days.

2805 (3076). **Commissioner subpœnas witnesses; default proved by his certificate.**—The commissioner has power to issue subpœnas for witnesses, which may be served by the sheriff or any constable; and the certificate of the commissioner that a witness failed to appear, together with the return of service by the officer, is proof of the facts.

2806 (3075). **Penalty for failure of witness to appear; how recovered.**—Any witness whose testimony is required, and who fails, on due notice, to appear before the commissioner and give evidence, forfeits to the party aggrieved the sum of one hundred dollars, for which, on motion, judgment may be rendered by the court where the cause is pending, on five days' notice in writing; and is also liable, at the suit of the party aggrieved, to an action for damages; but the witness may make his excuse as in other cases.

2807 (3073). **Duty of commissioner in executing commission.**—It is the duty of the commissioner to reduce the answers of the witness to writing, or cause it to be done by the witness himself, or some impartial person, as near as may be, in the language of the witness, having first sworn him to speak the truth, the whole truth, and nothing but the truth; and the deposition, when complete, must be by the commissioner enveloped, together with the commission and any document which may have been deposed to, sealed and directed to the clerk of the court

where the cause is pending, with the title of the cause indorsed thereon.

When commission may be executed.—Herndon v. Givens, 16 Ala. 262; Jordan v. Jordan, 17 Ala. 466; Dill v. Camp, 22 Ala. 249. **Commissioner need not be sworn.** Wolfe v. Parham, 18 Ala. 441. **Answers cannot be reduced to writing by brother of party.**—Bryant v. Ingraham, 16 Ala. 116. **Brother-in-law of party incompetent to act.**—Ib. **When party cannot object that one commissioner acted.**—Douge v. Pearce, 13 Ala. 128. **Failure to write name across seal of envelope, no ground to suppress deposition.**—Park v. Bancroft, 12 Ala. 468. **Identifying exhibits.**—Mobley v. Leophart, 51 Ala. 587; Humphrey v. Dawson, 38 Ala. 199. **Commissioner has no right to correct name of witness.**—East v. Pace, 57 Ala. 521.

2808 (3074). **Certificate of commissioner evidence; how returned.**—The certificate of the commissioner of the manner, time and place of taking the deposition, and that he has personal knowledge of, or has had proof made before him of the identity of the witness, and that he is not of counsel or of kin to any of the parties to the cause, or in any manner interested in the result thereof, shall be presumptive evidence of the facts stated by him; and the package may be sent by mail or by private conveyance to the clerk.

Certificate.—Broadnax v. Sullivan, 29 Ala. 320; Dill v. Camp, 22 Ala. 249; Thrasher v. Ingram, 32 Ala. 645; Bell v. Chambers, 38 Ala. 660; Boykin v. Smith, 65 Ala. 294; Roberts v. Fleming, 31 Ala. 683; Reese v. Beck, 24 Ala. 651; Dill v. Camp, 22 Ala. 249; Farrelly v. Maria, 34 Ala. 284; Gulf City Ins. Co. v. Stephens, 51 Ala. 121; Buford v. Gould, 35 Ala. 265; Stetson v. Lyons, 34 Ala. 140. **Commissioner may amend at trial.**—Dunlap v. Horton, 49 Ala. 412.

2809 (3077). **Depositions thus taken read in evidence.** Any deposition thus taken may be read in evidence, so far as the same is pertinent to the issue, and legal evidence; and if the package bears no marks of violence, or evidence of mutilation, must be presumed to be as it came from the hands of the commissioner until the contrary is shown.

When deposition taken in another suit may be read.—Holman v. Bank of Norfolk, 12 Ala. 370.

2810 (3081). **Objections to the whole deposition taken before trial.**—All objections to the admissibility of the entire deposition in evidence must be made before entering on the trial, and not afterwards, unless the matter is not disclosed in the deposition, and appears after the commencement of the trial.

When motion too late, if made on trial.—May v. May, 28 Ala. 141; M. & C. R. R. Co. v. Maples, 63 Ala. 601; Cornelius v. Partain, 39 Ala. 473; Thompson v. Rawles, 33 Ala. 29; Brice v. Lide, 30 Ala. 647; Hair v. Little, Ib. 236; Hudson v. Crow, 26 Ala. 515; DeVendal v. Malone, 25 Ala. 272; Gray v. Brown, 22 Ala. 262; Kyle v. Bostick, 10 Ala. 589; Colgin v. Redman, 20 Ala. 650; Hudson v. Howlett, 32 Ala. 478; Wilkinson v. Moseley, 30 Ala. 562; Boykin v. Collins, 20 Ala. 230; Irby v. Kitchell, 42 Ala. 438; Clement v. Cureton, 36 Ala 120; McGill v. Monette, 37 Ala. 49; Park v. Wooten, 35 Ala. 242; McCreary v. Turk, 29 Ala. 244; Whilden v. M. & P. Bank, 64 Ala. 2; Morgan v. Wing, 58 Ala. 301; McArthur v. Carrie, 32 Ala. 75; Nelson v. Iverson, 24 Ala. 10; P. & M. Ins. Co. v. Tunstall, 72 Ala. 142; Binford v. Dement Ib. 491; L. & N. R. R. Co. v. Brown, 56 Ala. 411; Grey v. Mobile Trade Co., 55 Ala. 387. **When made on trial.**—McCreary v. Turk, 29 Ala. 244; Whilden v. M. & P. Bank, 64 Ala. 2. **If party fails to object to interrogatory,** he cannot object to answer, if responsive.—Fountain v. Ware, 56 Ala. 558. **Adoption of answers to direct, on cross examination.**—Gulf City Ins. Co. v. Stephens, 51 Ala. 121. **Adoption of answers of another witness.** David v. David, 66 Ala. 140. **What matters witness can answer to general interrogatory.**—Blunt v. Strong, 60 Ala. 572; Yarborough v. Hood, 13 Ala. 176. **Objection on special ground, waiver of other grounds.**—Agee v. Williams, 30 Ala. 636; Bartee v. James, 33 Ala. 34 **Deposition not to be suppressed because taken before filing of amended complaint.**—Goldsmith v. Picard, 27 Ala. 142; Agee v. Williams, 30 Ala. 636.

2811 (3080). **When witnesses may be re-examined on cross interrogatories.**—The party against whom the deposi-

tion of a witness has been taken may cross-examine such witness on interrogatories, under the rules for taking depositions, on making affidavit, when such witness has not been cross-examined, that a cross examination is necessary, and that the failure to cross-examine the witness was without fault or neglect on his part, or, when the witness has been cross-examined, but such examination is imperfect or insufficient, that the cross examination of such witness is imperfect or insufficient, and that the imperfection or insufficiency was not caused by fault or neglect on his part. Notice of the filing of interrogatories for such cross examination, and of the name and residence of the commissioner to be appointed to take the deposition of the witness thereon, must be given, as in the case of filing direct interrogatories, to the opposite party, who has ten days thereafter to file rebutting interrogatories.

2812 (3078). **Depositions, except of females, taken de bene esse.**—The deposition of a witness cannot be used, if it appear at the trial that the cause for which it was taken does not then exist, unless such witness is dead, of unsound mind, or resides more than one hundred miles from the place of trial.

Mobile Ins. Co. v. Walker, 58 Ala. 290; Henry v. Northern Bank, 63 Ala. 527; M. & C. R. R. Co. v. Maples, Ib. 601; Humes v. O'Bryan, 74 Ala. 64.

2813 (3079). **When personal attendance of witnesses compelled.**—When the deposition of any witness, residing in the county in which the cause is pending, shall have been taken under the provisions of this article, the court, or, in vacation, the clerk, on the application of either party, supported by the affidavit of the party, his agent, or attorney, that he believes the personal attendance of the witness on the trial is necessary, may make an order requiring such witness to attend the trial of such cause in person. A copy of the order, with a subpœna, must be served on the witness, and, on proof of such service, the deposition must be suppressed on the trial.

2814 (3082). **Interrogatories to witnesses in foreign suits.** The provisions of this article to compel witnesses to answer interrogatories, and for failure to answer, are applicable to parties litigant in the courts of such states as grant similar privileges to citizens of this state, and proceedings therefor may be had in the circuit court of the county where the witness resides. The certificate of the person issuing the commission, that the state in which such suit is pending has a statute to compel witnesses to testify in foreign suits, is prima facie evidence of that fact; but no witness shall be required to give testimony under such commission, unless the party desiring such testimony, his agent, or attorney, first deposit with the commissioner for the witness the amount allowed by law for mileage and per diem to witnesses attending to give evidence under commission from courts of this state, which deposit may be evidenced by the certificate of the commissioner.

2815 (3083). **Fees of witnesses before commissioner.**—Witnesses who attend and testify, with or without subpœna, are, on the certificate of the commissioner of the distance traveled and the number of days' attendance, entitled to the same compensation as other witnesses, and the commissioner to twenty cents for every hundred words; all of which must be taxed in the bill of costs upon the certificate of the commissioner.

ARTICLE IV.

EXAMINATION OF PARTIES BY INTERROGATORIES.

As amended, Dec. 10, 1878, p. 79.

2816 (3084). **Interrogatories to adverse party.**—Either party to a civil suit, his agent, or attorney, desiring the testimony of the other party, may file with the clerk interrogatories to be propounded to him, with an affidavit that the answers thereto will be material testimony for him in the cause.

Saltmarsh v. Bower, 22 Ala. 221; Mallory v. Brown, 37 Ala. 422; Crymes v. White, Ib. 549; McCargo v. Crutcher, 27 Ala. 171.

2817 (3085). **Service of copy; issue of commission when non-resident.**—If the party whose testimony is required resides out of the state, the clerk must issue a commission to take his testimony, to which a copy of the interrogatories must be appended; if he resides within the state, the party desiring his testimony must serve him with a copy of the interrogatories, which may be executed by the sheriff.

2818 (3086). **Answers evidence.**—The answers to the interrogatories, duly sworn to before, and certified by any officer authorized to take and certify affidavits, are evidence in the cause when offered by the party taking them.

Branch Bank v. Parker, 5 Ala. 731; Saltmarsh v. Bower, 22 Ala. 221; Wells v. Bransford, 28 Ala. 200.

2819 (3087). **Impertinent questions need not be answered.** If the interrogatories are not pertinent to the issue or matter in dispute between the parties, there shall be no obligation to answer them, and, if answered, the answers may be suppressed by the court at the trial.

2820 (3088). **Proceedings on failure to answer.**—If answers to the interrogatories are not filed within sixty days after service of a copy of the interrogatories, or when the answers are not full, or are evasive, the court may either attach the party and cause him to answer fully in open court, or continue the cause until full answers are made, or direct a nonsuit or judgment by default to be entered.

Goodwin v. Harrison, 6 Ala. 438; Pool v. Harrison, 18 Ala. 515; Ex parte Grantland, 29 Ala. 69; Ex parte McLendon, 33 Ala. 276.

2821 (3089). **Answer may be contradicted.**—A resort to this mode of obtaining evidence does not preclude the party calling for it from adducing other proof of the same facts, or from contradicting it.

Wilson v. Maria, 21 Ala. 359.

2822 (3090). **What questions must be answered.**—Under the provisions of this article, the party is bound to answer all pertinent interrogatories, unless by the answer he subjects himself to a criminal prosecution.

ARTICLE V.

PROCEEDINGS TO PERPETUATE TESTIMONY.

2823 (3091). **Testimony may be perpetuated.**—The testimony of a witness may be taken conditionally, and perpetuated, as provided in this article.

2824 (3092). **Affidavit specifying grounds.**—The applicant

must make affidavit before a circuit or probate judge, or register in chancery, stating,—

1. That he is a party, or expects to be a party, to a suit, either at law or in equity, in a court of this state.

2. That the testimony of a witness, whose name and place of residence are stated, is necessary to the prosecution or defense of such suit, and the facts generally expected to be proved by the witness.

3. If such suit be not actually commenced, the name of the party who is expected to be adverse therein, his residence, and that he is of full age.

2825 (3093). **Order for examination; notice to adverse party.**—Such judge or register must thereupon make an order allowing the examination of the witness, and, if the adverse party, or the party expected to be adverse to the application, resides in this state, a copy of such application, and notice of the time and place of such examination, must be given him, at least ten days before such examination.

2826 (3094, 3096). **Notice when adverse party non-resident.**—If such adverse party, or expected adverse party, is a non-resident, notice of such application, of the time and place of the examination, of the names and residences of the witnesses to be examined, and of the matter touching which the examination is to be had, must be given by publication, once a week for three successive weeks, in such newspaper as the judge or register may direct; and a copy of such paper, containing such publication, must be sent by mail, directed to such adverse party at his post-office, if known; and if such adverse party is a non-resident, the examination must not be taken within less than forty days from the time of the first publication. The costs of the publication must be paid by the applicant.

2827 (3097). **Examination.**—Upon the application being returned executed by the sheriff, or proof of publication, as the case may be, such judge or register must take the deposition of the witness at the time and place appointed; and the examination, if necessary, may continue from day to day until completed.

2828 (3098, 3099). **Examination reduced to writing, certified and filed with circuit clerk.**—The witness, having been first duly sworn, every question and answer must be taken down, and the deposition, when completed, carefully read to, and subscribed by the witness, certified by the judge or register, and, with all the papers, must be immediately filed in the office of the clerk of the circuit court for the county in which it was taken. The return of the sheriff of service of the notice and application, or affidavit by the publisher of the publication of the notice and mailing of copies to the adverse party, is presumptive evidence of the facts therein stated. The clerk must record all the papers so returned to him.

2829 (3100). **Deposition; when evidence.**—If a trial be had between the persons described in the affidavit as parties, actual or expectant, or their successors in interest, upon proof of the death or insanity of the witness at the time of such trial, the deposition, or a certified copy thereof, may be given in evidence by either party.

2830 (3101). **Effect of such depositions as evidence.**—The deposition so read in evidence has the same effect as the oral

testimony or the deposition of such witness, and no other; and every objection to the witness, or to the relevancy of any question put to him, or of any answer made by him, may be made in the same manner as if he was orally examined on the trial, or as if his deposition had been taken in the case.

2831 (3102). **Fees.**—The judge of probate or register examining is entitled, for copy of application and taking down questions and answers, to twenty-five cents for each hundred words, and for the other duties, one dollar on each application, to be paid by the applicant; the sheriff, for serving and returning the application and notice, one dollar; the clerk, for recording, fifteen cents for each hundred words.

CHAPTER 11.

AMENDMENTS.

2832 (3155). **Proceedings not vitiated by want of form.** No summons, complaint, plea, return, process, judgment, or other proceeding, can be arrested, quashed, or reversed for any defect or want of form, in any of the courts of this state; but the courts must proceed and give judgment according to the right of the cause and matter in law, without regard to any defect or want of form in the summons, complaint, or other pleading.

Sheppard v. Melloy, 12 Ala. 561; Ala. Conference v. Price, 42 Ala. 39.

2833 (3156). **Amendments allowed.**—The courts, respectively, must, whilst the cause is in progress, amend all and every such imperfection and defect of form, on motion of the party, without costs and without delay, unless injustice will thereby be done to the opposite party; and must permit the amendment of the complaint by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant, upon such terms and conditions as the justice of the case may require.

General scope of statute.—Crimm v. Crawford, 29 Ala. 623; Johnson v. Martin, 54 Ala. 271; Sanders v. Knox, 57 Ala. 80; Steed v. McIntyre, 68 Ala. 407; Mahan v. Smitherman, 71 Ala. 563; Beavers v. Hardie, 59 Ala. 570. **Amendment by striking out or adding parties plaintiff; when allowable.**—McBrayer v. Cariker, 64 Ala. 50; Harris v. Swanson, 62 Ala. 299; Berry v. Ferguson, 58 Ala. 314; Godbold v. Blair, 27 Ala. 592; Williams v. Bowden, 68 Ala. 126; Sanders v. Knox, 57 Ala. 80. **When not.**—Pickens v. Oliver, 32 Ala. 626; Leaird v. Moore, 27 Ala. 326; Friend v. Oliver, Ib. 532; Stodder v. Grant, 28 Ala. 416; Tarver v. Smith, 38 Ala. 135. **Amendment striking out name of nominal plaintiff allowable.**—Dwyer v. Kennemore, 31 Ala. 404. **Also inserting nominal plaintiff.**—Harris v. Plant, 31 Ala. 639; Johnson v. Martin, 54 Ala. 271. **Also striking out "for the use of" another.**—Caldwell v. Smith, 77 Ala. 157; Dane v. Glennon, 72 Ala. 160. **Also changing capacity in which plaintiff sues.**—Ikelheimer v. Chapman, 32 Ala. 676; Longmire v. Pilkington, 37 Ala. 296; Crimm v. Crawford, 29 Ala. 623; Agee v. Williams, 30 Ala. 636; McCoy v. Watson, 51 Ala. 466; Farrow v. Bragg, 30 Ala. 261; Long v. Patterson, 51 Ala. 414. **Also adding new beneficiaries.**—Humphries v. Dawson, 38 Ala. 199. **But a change from guardian of ward to ward by next friend, not allowable.**—Fowlkes v. M. & C. R. R. Co., 38 Ala. 310. **Amendment striking out wrong and inserting right christian name, allowable.**—New York Con. Co. v. Meyer, 51 Ala. 326. **Also inserting individual names of parties plaintiff and defendant.**—Sims v. Jacobson, 51 Ala. 186. **Also avering corporate capacity.** Southern Life Ins. Co. v. Roberts, 60 Ala. 431. **Also correcting corporate name.** Smith v. Tallassee, 30 Ala. 350. **Amendment striking out sole defendant, not allowable.**—Ex parte Collins, 49 Ala. 69. **Nor adding defendant not liable at commencement of suit.**—Burns v. Campbell, 71 Ala. 272. **Nor changing capacity in**

which sued.—Taylor v. Taylor, 43 Ala. 649; Christian v. Morris, 50 Ala. 585. **Nor when it operates a discontinuance.**—Whitaker v. Van Horn, 43 Ala. 255; Fennell v. Masterson, Ib. 268; Bachus v. Mickle, 45 Ala. 445; Masterson v. Gibson, 56 Ala. 56; Mock v. Walker, 42 Ala. 668; Jones v. Englehardt, 78 Ala. 505. **When amendment introduces no new cause of action.**—Dowling v. Blackman, 70 Ala. 303; Ricketts v. Weeden, 64 Ala. 548; Steed v. McIntyre, 68 Ala. 407; Mohr v. Lemle, 69 Ala. 180; Simpson v. M. & C. R. R. Co., 66 Ala. 85; Foster v. Napier, 73 Ala. 595; Taylor v. Perry, 48 Ala. 240; Burch v. Taylor, 32 Ala. 26; Stringer v. Waters, 63 Ala. 361; Mitchell v. Davis 58 Ala. 615; Robinson v. Darden, 50 Ala. 71; Phillips v. Smith, 62 Ala. 575; Prater v. Miller, 25 Ala. 320; Boardman v. Parrish, 56 Ala. 54. **When new cause introduced.**—Mobile Ins. Co. v. Randall, 74 Ala. 176; Harris v. Hillman, 26 Ala. 380. **Adding common counts.**—Boyleston v. Sherman, 31 Ala. 538; Mahan v. Smitherman, 71 Ala. 563. **Amendment causing misjoinder not allowable.**—Wilson v. Stewart, 69 Ala. 302. **Nor demurrable amendment.**—Beavers v. Hardie, 59 Ala. 570. **Nor when not supported by evidence.**—Ib. **Doctrine of relation as affecting statute of limitations.**—Bradford v. Edwards, 32 Ala. 628; King v. Avery, 37 Ala. 169; Agee v. Williams, 30 Ala. 636; Stringer v. Waters, 63 Ala. 361; Ricketts v. Weeden, 64 Ala. 548; Mohr v. Lemle, 69 Ala. 180; Dowling v. Blackman, 70 Ala. 303; Evans v. Richardson, 76 Ala. 329; Seibs v. Englehardt, 78 Ala. 508; Lansford v. Scott, 51 Ala. 557. **When objection to amendment waived.**—Bryan v. Wilson, 27 Ala. 208; Felkel v. Hicks, 32 Ala. 25. **Motion to strike from file, not demurrer, mode of reaching variance.**—Turner v. Rountree, 30 Ala. 707. **Allowance cannot be revised without objection.**—Stewart v. Goode, 29 Ala. 476. **Abatement cannot be cured by.**—Evans v. Welsh, 63 Ala. 250. **Amendment of information against attorney, allowable.**—Thomas v. Stepney, 58 Ala. 365.

2834 (3157). **Mistake of name, sum, quantity, or date, cured by judgment.**—Any mistake in the christian or surname of either party, sum of money, quantity of merchandise, day, month, or year, in the summons, complaint, or other pleading, the same being right in any part of the record or proceedings, must, after judgment, be considered as having been amended whilst the cause was in progress.

See citations to preceding section.

2835 (3158). **When judgment not set aside, if complaint contain cause of action.**—No judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action.

Browder v. Gaston, 30 Ala. 677; Walker v. Mobile Dock Co, 31 Ala. 529; Blunt v. McNeil, 29 Ala. 473; Childress v. Mann, 33 Ala. 206; Douglas v. Beasley, 40 Ala. 142; Randolph v. Sharpe, 42 Ala. 265; Lanford v. Patton, 44 Ala. 584; Watson v. Knight, Ib. 352; Relfe v. Valentine, 45 Ala. 287; Winnemore v. Mathews, Ib. 448; Wilson v. Owens, Ib. 451; Ware v. St. Louis Co., 47 Ala. 667; Roddy v. McGetrick, 49 Ala. 160; Parker v. Abrams, 50 Ala. 35; Shouse v. Lawrence, 51 Ala. 559; Taylor v. Jones, 52 Ala. 78; M. & M. R. R. Co. v. Smith, 51 Ala. 329; Thomas v. Stepney, 58 Ala. 365; Ritch v. Thornton, 65 Ala. 309.

2836 (3154). **Amendment within three years; when allowed.**—The judges of the circuit courts may, at any time within three years after the rendition of final judgment, upon the application of either party, amend any clerical error, mistake in the calculation of interest, or other mistake of the clerk, when there is sufficient matter apparent on the record or entries of the court to amend by. No cause can be reversed for such error or defect by the supreme court, unless the court of original jurisdiction refuses to make the amendment.

Sellers v. Smith, 11 Ala. 264; Smith v. Robinson, Ib. 270; Harris v. Billingsley, 18 Ala. 438; Gibson v. Wilson, Ib. 63; Stephens v. Norris, 15 Ala. 79; Sartor v. Branch Bank, 29 Ala. 353; Philippi v. Harberlee, 45 Ala. 597; Poole v. Minge, 50 Ala. 100; Ex parte Jones, 61 Ala. 399; Whorley v. M. & C. R. R. Co., 72 Ala. 20; s. c., 74 Ala. 264; Stoutz v. Rouse, 75 Ala. 431.

CHAPTER 12.

COSTS.

ARTICLE 1.—Taxation and retaxation of costs.
2.—Security for costs.

ARTICLE I.

TAXATION AND RETAXATION OF COSTS.

2837 (3128). **Costs given to successful party.**—The successful party in all civil actions is entitled to full costs, for which judgment must be rendered, unless in cases otherwise directed by law; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions, as in cases of individual suitors.

McWhorter v. Marrs, 1 Stew. 63; Townsend v. Moore, 9 Port. 136; Shearer v. Boyd, 10 Ala. 279; Westmoreland v. Hale 11 Ala. 122; Massey v. Steele, 11 Ala. 340; Patterson v. Officers, Ib. 740; McPhail v. Moseley, 14 Ala. 740; Hanson v. Jacks, 22 Ala. 549; Prestridge v. Officers, 42 Ala. 405; Dover v. State, 45 Ala. 244; Beach v. Dennis, 47 Ala. 262; Folmar v. Folmar, 71 Ala. 136.

2838 (3129). **Rule for recovery in torts, if verdict is for less than twenty dollars; exception.**—In all actions to recover damages for torts, the plaintiff recovers no more costs than damages, where such damages do not exceed twenty dollars, unless the presiding judge certifies that greater damages should have been awarded; and on failure to certify, judgment must be rendered against the plaintiff for such residue.

Reed v. Gordon, 2 Stew. 469; McAllister v. McDow, 26 Ala. 453; Tecumseh v. Mangham, 67 Ala. 246.

2839 (3130). **Defendant proving usury recovers costs.**—If it be made to appear that usurious interest has been intentionally taken or reserved, the defendant recovers full costs.

Black v. Hightower, 30 Ala. 317.

2840 (3131). **Costs of set-off, if sustained, recovered by defendant.**—In all actions, when a set-off is pleaded and controverted, the defendant recovers his costs sustained in establishing the set-off, though judgment be rendered for the plaintiff for a residue.

Fuller v. Hunter, 34 Ala. 56.

2841 (3132). **Fees of witnesses for mileage and attendance.**—Witnesses are allowed one dollar and fifty cents per day in civil cases; also five cents per mile for each mile to and from their residence by the usual traveled route, and all necessary ferriage, tolls of turnpikes and toll-bridges, whether attending under subpœna, or at the request of the party.

Coker v. Patty, 51 Ala. 511.

2842 (3133). **Certificates to witnesses.**—After the trial, continuance of the cause, or discharge of the witness, the clerk must, on his application, and upon his oath, give him a certificate, setting forth the cause in which he was a witness, the party by whom he was summoned, or on whose request he attended, the number of days he attended as a witness, and the sum to

which he is entitled for his attendance, travel, ferriage and tolls, which he must also enter, either upon the subpœna docket, or book to be kept for that purpose.

Hill v. White, 1 Ala. 576; Carville v. Reynolds, 9 Ala. 969; Marsh v. Branch Bank, 10 Ala. 57; Burns v. Howard, 68 Ala. 352.

2843 (3134). **Attendance; when proven.**—The witness must prove his attendance within five days after the adjournment of the court at which he attended.

Hill v. White, 1 Ala. 576.

2844 (3135). **Only to charge one party.**—A witness shall charge for his attendance but on one side of the same cause.

Findley v. Wyser, 1 Stew. 23; Renfro v. Kelly, 10 Ala. 338.

2845 (3136). **Costs against beneficial plaintiff.**—When judgment is rendered against the plaintiff, in any suit brought in the name of a nominal plaintiff for the use of another, judgment for costs must be rendered against the beneficiary, or his personal representative.

Coalter v. Bell, 2 Stew. & Port. 358; Bates v. Terrell, 7 Ala. 129; Griffin v. Smith, 14 Ala. 571; Scott v. John, 15 Ala. 566; Dover v. State, 45 Ala. 244.

2846 (3137). **Costs of transcript of other court taxed.** When the suit is founded on the record of another court, the costs of the transcript, on proof to the court, must be taxed in the bill of costs.

2847 (3138). **Fees for certificates taxed in the bill.**—When either party introduces on the trial any execution, bond, or other matter of evidence, certified by any officer or person whose certificate makes the copy thereof evidence, the fees allowed by law to such officer or person, for the transcript thereof and certificate, must be allowed as costs.

2848 (3139). **Costs on a plea "since last continuance."** When the party filing a plea "since last continuance" succeeds thereon, but fails on the plea to the merits, previously filed, he must be taxed with the costs which accrued previous to the filing of the last plea.

Dolberry v. Trice, 49 Ala. 207.

2849 (3140). **Witness fees taxed, collected and paid to clerk.**—Upon the final disposition of any civil cause, the amount proved by the witnesses, as hereinbefore provided, must be taxed in the bill of costs against the rightful party, setting forth the name of each witness, and the amount allowed him, which must be collected by the sheriff for the use of such witnesses, and be paid to the clerk issuing the execution, unless the certificate of such clerk, with the receipt of the witness thereon, is produced to the sheriff.

2850 (3141). **When refused payment, witness excused from further attendance.**—The certificate issued to the witness entitles him to demand of the party summoning him, or at whose request he attended, the amount therein stated, and is presumptive evidence that such amount is due, in any proceeding instituted for its recovery; and if in any civil cause, on demand therefor of the party, his agent, or attorney, the same is not paid, the witness is not obliged to appear again as a witness in the same cause until his fees are paid.

2851 (3142). **On abatement by death of defendant, plaintiff pays costs.**—When a plaintiff brings a suit which he suffers to

abate by the death of the defendant, or other cause, judgment for costs shall be rendered against such plaintiff; or where the suit abates by the death of the plaintiff, and his representative fails to revive the same, judgment for costs may be rendered against such representative; judgments in both cases must be in the name of the officers of the court, and when against representatives, are paid as other claims against such estate.

Garrison v. Burden, 40 Ala. 513; Prestridge v. Officers, 42 Ala. 405.

2852 (3143). **Defendant, as to whom plaintiff fails, recovers costs.**—When a plaintiff fails to recover against all of the defendants, the defendants against whom he fails to recover are entitled to have their aliquot proportion of the whole costs taxed against the plaintiff.

2853 (3144). **Only two witnesses charged to prove one fact; exception.**—Not more than two witnesses shall be taxed in any bill of costs, who were called to prove any one matter of fact, or, having been subpœnaed, were not examined, unless the court, upon a motion to retax the costs, should, in its discretion, consider that the circumstances of the case warranted the examining or summoning of more than two witnesses for the proof of a particular fact; or unless such witnesses were summoned or examined to assail or defend the reputation of a witness for veracity, or to assail or to establish the character of a party, when character is put in issue.

Porter v. Williams, 22 Ala. 527; Murphy v. State, 71 Ala. 15.

2854 (3145). **Motion for instructions to clerk in such case.** If more than two witnesses are examined in proof of any particular fact, a motion must be made, at the term at which the cause is tried, for instructions to the clerk as to the taxation of costs, and cannot be made afterwards.

2855 (3146). **Motion to retax costs.**—If the taxation of costs be excessive, by charging the costs of witnesses who were not examined, or by charging costs to an improper party, or taxing costs contrary to law, the party aggrieved may move the court for a retaxation, setting forth the particulars in which the clerk has erred.

Briley v. Hodges, 3 Port. 335; Spann v. Cole, 13 Ala. 473; Pryor v. Beck, 21 Ala. 393; Tecumseh Co. v. Mangham, 67 Ala. 246.

2856 (3147). **When sheriff ordered not to collect items of costs.**—If execution has issued in any such case, the party complaining thereof, or his attorney, may file a written application with the clerk for a retaxation of the costs, setting forth in what the alleged error consists, and the clerk must issue an order to the sheriff, directing him to abstain from the collection of the disputed items of cost until the further order of the court, to which a motion must be made, at the ensuing term, for a retaxation thereof.

2857 (3148). **Payment of costs against township.**—If any township shall fail to recover in any suit brought by it, the clerk of the court or justice of the peace shall certify the costs to the superintendent of education, who shall pay the same out of the funds of such township, if any it have.

ARTICLE II.

SECURITY FOR COSTS.

As amended, Feb. 17, 1885, p. 137.

2858 (3149, 3772). **Non-residents must give security for costs.**—All suits at law or in equity, commenced by or for the use of a non-resident of this state, must be dismissed on motion, if security for the costs, approved by the clerk or register, be not given by such non-resident when the suit is commenced, or within such time thereafter as the court may direct.

What proceedings within the statute.—Ex parte Robbins, 29 Ala. 71; Shepherd v. Spriggs, Ib. 673; Garrett v. Terry, 33 Ala. 514; McAdams v. Beard, 34 Ala. 478; Forrester v. Forrester, 35 Ala. 594. **Non-residents within statute.**—Ex parte Cole, 28 Ala. 50; Ex parte Bush, 29 Ala. 50; Ex parte Jemison, 31 Ala. 392; Davis v. You, 43 Ala. 691. **Refusal to dismiss available on appeal.**—Empire v. Ala. Mining Co. 29 Ala. 698. **But not without exception.**—Tuskaloosa Co. v. Mayor, 38 Ala. 514; Eslava v. Ames Plow Co., 47 Ala. 384. **What sufficient lodgment.**—Ex parte Locke, 46 Ala. 77 **What not a compliance with statute.**—Ex parte Morgan, 30 Ala. 51; Bullard v. Jones, 50 Ala. 382; Ulman v. Langham, 49 Ala. 265. **What is.**—Ex parte Camp, 35 Ala. 143. **When right of objection waived.**—Weeks v. Napier, 33 Ala. 568; Harper v. Columbus Factory, 35 Ala 127; Lavange v. Burke, 50 Ala. 61; Heflin v Rock Mills, 58 Ala. 613; Dunklin v. Richardson, 34 Ala. 117. **When judgment debtor cannot move to dismiss garnishment.**—Edmondson v. DeKalb County, 51 Ala. 103 **Recovery on bond for costs.**—Pryor v. Beck, 21 Ala. 393. **Sureties' liability.**—Shepherd v. Spriggs, 29 Ala. 673. **If insufficient, new security should be allowed.**—Peavey v. Burket, 35 Ala. 141; Stribling v. Bank, 48 Ala. 451. **When motion to dismiss sufficient.**—Boswell v. Morton, 20 Ala. 235.

Ib.

2859. Money may be deposited.—Money may be deposited with the clerk or register as security, the amount of the deposit to be fixed by the clerk or register, subject to increase or diminution on the order of the court.

2860 (3153). **When attorney liable for costs.**—If a suit, commenced by or for the use of a non-resident of the state, is dismissed for the want of security for costs, on motion, judgment for the costs must be rendered against the attorney or solicitor instituting the suit, knowing of the non-residence of the plaintiff.

2861 (3150). **If plaintiff removes, security required.**—If suit be commenced by or for the use of a resident, who afterwards removes from the state, the defendant, by motion to the court in term time, or by notice to the plaintiff, his agent, or attorney, or solictor, in vacation, may require security for costs; and if such security be not given at or before the next term of the court, the suit must be dismissed.

2862 (3152). **Judgment against surety for costs.**—If judgment be rendered for the defendant, judgment must, on motion, be rendered against the surety for the costs, as well as against the plaintiff.

2863. Security for costs in court of probate, or before justice.—The provisions of this article apply to suits or proceedings in the court of probate, or before a justice of the peace; and the judge of probate, or the justice, must take and approve the security for costs.

CHAPTER 13.

CORRECTION OF ERRORS AFTER JUDGMENT, AND PREVENTION OF ABUSE OF PROCESS; ENTRY OF SATISFACTION; JUDGMENTS NUNC PRO TUNC; REHEARINGS AND NEW TRIALS.

2864 (3159). **Correction of errors; prevention of abuse of process.**—The circuit court has power after final judgment,—

1. To correct any error in fact in the judgment or process, apparent upon the whole record.

2. To secure parties or privies in their rights against any oppression or abuse of execution, or other process, or upon any release, discharge, or payment after judgment.

Edwards v. Lewis, 16 Ala. 813; Miller v. Vaughan, 73 Ala. 313.

2865 (3172). **Entry of satisfaction of judgment or decree.** When a motion is made to enter satisfaction of a judgment or decree, because of matters extrinsic to the record, notice to the plaintiff therein, or, if he be dead, to his personal representative, is essential; if the plaintiff, or his personal representative, reside within the state, the notice must be in writing, and must be served ten days before the time of hearing the motion; if he or they reside without the state, or their residence be unknown, affidavit of the fact being made and filed, notice must be given by the clerk, register, judge of probate, or justice of the peace, by advertisement in some newspaper published in the county, for three consecutive weeks, or if there be no such paper published in the county, by advertisement in a newspaper published nearest to the county.

Bruce v. Barnes, 20 Ala. 219; Glass v. Glass, 76 Ala. 368.

2866 (3172). **Motion to set aside judgments or decrees, or entry of satisfaction.**—When a motion is made to set aside a final judgment or decree, or the entry of satisfaction thereof for any cause, notice to the party adversely interested, or, if he be dead, to his personal representative, is essential; and if such party, or his personal representative, reside within the state, the notice must be in writing, and must be served ten days before the hearing of the motion; if he or they reside without the state, or their residence be unknown, affidavit of the fact being made and filed, notice must be given by the clerk, register, judge of probate, or justice of the peace, by advertisement for three consecutive weeks in a public newspaper published in the county, or if there be no such paper published in the county, by advertisement in a newspaper published nearest to the county.

2867. Amendments of judgments, decrees, or orders nunc pro tunc.—Notice is essential of a motion or application to amend nunc pro tunc the judgment, decree, or order of a court of record, if the amendment be not of mere clerical errors; if the party adversely interested, or, if he be dead, his personal representative, reside in the state, the notice must be in writing, and must be served ten days before the hearing of the motion or application; if he or they reside without the state, or their residence be unknown, affidavit of the fact being made and filed, March ', 1881, p. 66, sec. 1.

notice must be given by the clerk, register, or judge of probate, by advertisement in some newspaper published in the county for three consecutive weeks; or if there be no such paper published in the county, by advertisement in a newspaper published nearest to the county.

Ib. sec. 2.

2868. Costs of motion or application.—If a motion or application made under either of the three preceding sections is not contested, the costs must be adjudged against the applicant; if contested, the costs must be adjudged against the unsuccessful party.

Ib. sec. 3.

2869. Bill of exceptions; appeal.—An exception may be taken on the hearing of any motion or application made under either of such three sections to any ruling, charge, opinion, or decision of the court, and a bill of exceptions signed and certified as part of the record, as in civil cases in courts of law; and from the judgment, decree, or order of the court, an appeal may be taken to the supreme court within thirty days after the rendition of the judgment, decree, or order, under the rules and regulations governing appeals from the final judgments or decrees of the circuit or chancery court, or court of probate.

2870. Issues of fact triable by jury.—If the motion or application is to enter satisfaction of a judgment or decree, or to set aside the entry of satisfaction of a judgment or decree, on request of either party, the issues of fact must be tried by a jury.

2871 (3160). **Right of new trial on release found.**—When a party had a release or discharge in writing of a claim upon which judgment has been rendered against him, which was lost or mislaid at the trial, and which such party was unable to prove by secondary evidence, but has since found, the circuit court may cause the action to be retried at any time after the discovery of the release or discharge, within two years after judgment.

Davis v. McCampbell, 37 Ala. 609.

2872 (3161). **When rehearing granted within four months.** When a party has been prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part, he may, in like manner, apply for a rehearing at any time within four months from the rendition of the judgment.

When not entitled to rehearing.—White v. Ryan, 31 Ala. 400; Shields v. Burns, Ib. 535; Elliott v. Cook, 33 Ala. 490; Stewart v. Williams, Ib. 492; Davis v. McCampbell, 37 Ala. 609; Allington v. Tucker, 38 Ala. 655; Dothard v. Teague, 40 Ala. 583; Callahan v. Lott, 42 Ala. 167; Ex parte North, 49 Ala. 385; Bruce v. Williamson, 50 Ala. 313; Ex parte Walker, 54 Ala. 577; Ex parte Wallace, 60 Ala. 266; Martin v. Hudson, 52 Ala. 279; Brock v. S. & N. R. R. Co., 65 Ala. 79; Blood v. Beadle, Ib. 103; Renfro v. Merriman, 71 Ala. 195; Ex parte O'Neill, 72 Ala. 560; Freeman v. Gregg, 73 Ala. 199; Bingham v. Montgomery, 59 Ala. 334; Waddill v. Weaver, 53 Ala. 58. **A suit within the statute requiring security for costs.**—Garrett v. Terry, 33 Ala. 514. **Petition must be presented to the judge;** filing with clerk not sufficient.—Ex parte Johnson, 60 Ala. 429. **Proof and judgment.**—Pratt v. Keils, 28 Ala. 390. **Statute does not apply to common-law certiorari to commissioners' court.**—Ex parte Madison T. Co., 62 Ala. 93. **Affidavits will not aid averments of petition.**—Callahan v. Lott, 42 Ala. 167. **When filed too late.**—State v. Gardner, 45 Ala. 46. **Petition amendable.**—Dothard v. Teague, 40 Ala. 583. **When appeal lies.**—Lawson v. Moore, 45 Ala. 519; Ex parte North, 49 Ala. 385; White v. Ryan, 31 Ala. 400. **When appeal does not lie, but mandamus proper remedy.**—Callahan v. Lott, 42 Ala. 167; Ex parte North, 49 Ala. 385; Carroll v. Vaughan, 48 Ala. 352; Fuller v. Boggs, 49 Ala. 127; Heflin v. Rock Mills, 58 Ala. 613; O'Neal v. Kelly, 72 Ala. 559; Bruce v. Williamson, 50 Ala. 313; Ex parte Walker, 54 Ala. 577; Ex parte Wallace, 60 Ala. 267.

2873 (3162). **Contents of petition; notice; how petition controverted.**—In the cases specified in the two preceding sections, the proceeding is by petition to a judge of the circuit court, stating the matter complained of, with a prayer for the appropriate relief. The facts stated in the petition must be sworn to, unless they appear from a transcript of the record, submitted with the petition; and the petitioner shall give the adverse party, or his attorney, ten days' notice of the judge before whom, and the time when, and place where the application will be made, and also cause a copy of the petition to be served on such adverse party ten days before such application is made; and the adverse party may controvert the petition by affidavit in writing.

See citations to preceding section.

2874 (3163). **Supersedeas ordered by judge.**—The judge to whom the petition is made must, if satisfied that the petitioner is entitled to the relief sought, make the necessary order for a supersedeas to issue, or in restraint of the issue or collection of the execution; and the judge shall have power to impose such terms as he may think proper for granting an order for the supersedeas.

2875 (3164). **Bond before supersedeas issues.**—The supersedeas must not issue, nor the execution be suspended, unless the petitioner, or some one for him, give bond in double the amount of the judgment or execution, or in double the amount superseded or restrained, payable to the plaintiff in the judgment, or his personal representative, with sufficient sureties, to be approved by the clerk, and conditioned to pay such judgment or execution, with interest, and all damages and costs awarded on the trial of the proceeding against him.

2876 (3165, 3170). **Petition tried at first term; on denial on oath supersedeas dismissed.**—The facts alleged in the petition must be tried, or the cause reheard, at the first term after the granting of the order, unless for cause the same is continued; and the court may direct the trial of all questions of fact by a jury, upon an issue made up under its direction. When the cause is not tried or reheard at such first term, the court may, on the denial on oath by the adverse party of the facts alleged in the petition, make an interlocutory order dismissing the supersedeas, or dissolving the restraining order.

2877 (3166). **Refunding bond required, on such dismissal, before execution issues.**—In the case provided for in the preceding section, no execution can issue, unless such party, his agent, or attorney, execute a refunding bond, in double the amount of the judgment or execution, payable to the adverse party, with sufficient surety, to be approved by the clerk, and conditioned that if the final determination of the cause is against him, he will refund the amount collected, and interest.

2878 (3167). **Damages when petition not meritorious.**—If, on the final hearing of the cause, it is decided against the petitioner, and it appears that the petition was not founded on a just or meritorious cause, the court may award damages, not exceeding ten per cent. on the amount superseded or restrained.

2879 (3171). **Applicable to plaintiffs.**—The provisions of this chapter shall be construed as applicable to plaintiffs, and

those for whose benefit suits are brought, who must comply with its provisions, so far as applicable to them, before they are are entitled to relief.

2880 (3168). **Bonds have the force and effect of judgments.** The bonds given under this chapter have the force and effect of judgments, and executions may issue against all or any of the obligors, either for the amount superseded or restrained, damages and costs, or the amount collected of the petitioner, after the execution of the refunding bond, and interest on such amount.

2881 (3169). **Right to pass on validity of execution not affected.**—The provisions of this chapter must not be construed to prevent the circuit court from deciding, on an application made in term time, on the validity of any writ of execution.

CHAPTER 14.

EXECUTIONS AND FORTHCOMING BONDS.

ARTICLE 1.—Form of execution; by whom and when issued.
2.—Property subject to execution.
3.—Lien of execution.
4.—Levy, sale and return; venditioni exponas, and conveyance.
5.—Forthcoming bonds and executions thereon.

ARTICLE I.

FORM OF EXECUTION; BY WHOM AND WHEN ISSUED.

2882 (3179). **Executions on moneyed judgments, and for recovery of personal and real property; forms of.**—The party in whose favor a judgment is rendered, whether for debt, damages, or costs, for the satisfaction thereof, may, within a year thereafter, have a writ of fieri facias against the lands and goods of the party against whom such judgment is rendered; and when the judgment is for specific property or the alternate value, or for the possession of lands, appropriate writs of execution may issue for the satisfaction thereof; and such writs of fieri facias and of execution must substantially conform to the following forms:

[FORM OF FIERI FACIAS.]

"The State of Alabama, ——— county. } To any sheriff of the State of Alabama:

"You are hereby commanded that of the goods and chattels, lands and tenements of —— ——, you cause to be made the sum of —— dollars, which —— —— recovered of him on the —— day of ——, 18—, by the judgment of our circuit court, held for the county of ——, besides costs of suit; and have the same to render to the said —— ——; and make return of this writ and the execution thereof according to law.

"Witness my hand, this —— day of ——, 18—.

"—— ——, Clerk."

[FORM OF WRIT OF POSSESSION AND FIERI FACIAS.]

"The State of Alabama, } To any sheriff of the State of Ala-
——— county. } bama:

"You are hereby commanded to deliver to —— —— possession of the lands and tenements which the said —— —— recovered of —— —— by the judgment of our circuit court, held for the county of ——, on the —— day of ——, 18—, viz.: (Describe the land recovered). You are further commanded of the goods and chattels, lands and tenements of the said —— ——, you cause to be made the sum of —— dollars, damages adjudged to the said —— ——, and also the further sum of —— dollars, costs of suit; and make return of this writ and the execution thereof according to law.

"Witness my hand, this —— day of ——, 18—.

"—— —— Clerk."

[FORM OF WRIT FOR SEIZURE AND DELIVERY OF SPECIFIC PROPERTY.]

"The State of Alabama, } To any sheriff of the State of Ala-
——— county. } bama:

"You are hereby commanded to seize and deliver to —— —— the following personal property, viz.: (Describe the property recovered); which the said —— ——, on the —— day of ——, 18—, by the judgment of our circuit court, held for the county of ——, recovered of —— ——, if the same can be had; if not, you are hereby commanded that of the goods and chattels, lands and tenements of the said —— ——, you cause to be made the sum of —— dollars, the alternate value of the personal property, viz.: (Set out the assessed value of each item of personal property); also the further sum of —— dollars for the detention of said property by the said —— ——, besides —— dollars, costs of suit; and make return of this writ and the execution thereof according to law.

"Witness my hand, this —— day of ——, 18—.

"—— —— Clerk."

McMahan v. Colclough, 2 Ala. 68; Joseph v. Joseph, 5 Ala. 280; Haden v. Walker, Ib. 86; Vancleave v. Haworth, Ib. 188; Thompson v. Bondurant, 15 Ala. 346; Smith v. Knight, 11 Ala. 618; Barron v. Tart, 18 Ala. 668; Woodward v. Harbin, 1 Ala. 104; Couch v. Akinson, 32 Ala. 633; Goodman v. Walker, 38 Ala. 142; Callen v. Rottenberry, 76 Ala. 169.

2883 (3180). **Issue of executions; must be signed and tested.**—The clerk must issue executions on all judgments in favor of the successful parties, as soon after the adjournment of court as practicable, within the time prescribed by this Code, unless otherwise directed. The writ must be signed by the clerk, and tested on the day it is issued.

McMahan v. Colclough, 2 Ala. 68; Kyle v. Evans, 3 Ala. 481; Haden v. Walker, 5 Ala. 86; Averett v. Thompson, 15 Ala. 678; Harrell v. Martin, 6 Ala. 587.

2884 (3181). **Time in which executions must issue.**—When the court continues in session but one week, the clerk must issue executions within ten days thereafter; when it continues two weeks, within fifteen days thereafter; and when it continues three or more weeks, within twenty days after the adjournment of the court.

Davidson v. Wiley, 31 Ala. 452.

2885 (3182, 5015). **Bill of costs to accompany the execution.**—At the foot, or on some part of the execution, the clerk

must state, in intelligible words and figures, the several items composing the bill of costs; and without such copy of the bill of costs, the execution is illegal, and shall not be levied.

2886 (3183). **When may be issued before adjournment.** Upon the rendition of judgment, execution may be issued, by leave of the court, before the adjournment thereof, the plaintiff, his agent, or attorney, showing sufficient cause therefor by affidavit; but the defendant is not prevented thereby from moving for a new trial, or in arrest of judgment, or deprived of any right he would otherwise have had.

Savage v. Forward, 7 Ala. 463.

2887 (3184). **When must be issued immediately after adjournment.**—After the adjournment of the court, and before the expiration of the time limited by section 2884 (3181), on affidavit being made and filed in his office, that the defendant is about fraudulently to dispose of, or remove his property, and that thereby the plaintiff will probably lose his debt, the clerk must issue execution against the property of the defendant.

2888 (3185). **More than one writ may be issued.**—More than one writ of execution may be issued at the plaintiff's cost, though the first be not returned; and when a fieri facias is returned not satisfied, or satisfied only in part, an alias fieri facias may be issued.

Webb v. Bumpass, 9 Port. 201; Scull v. Godbolt, 4 Ala. 326; Leach v. Williams, 8 Ala. 759; Sellers v. Hayes, 17 Ala. 749; Pollard v. Cocke, 19 Ala. 188.

2889 (3186). **When directed to coroner.**—When the office of sheriff is vacant, and until his successor qualifies, or when the sheriff is imprisoned, or in cases to which he is a party, or in cases in which he is interested, or for any legal cause is incompetent to act, if such interest or cause appears on the face of the proceedings, the execution must be directed to, and executed by the coroner, or special coroner, as the case may be.

Pope v. Stout, 1 Stew. 375; Gresham v. Leverett, 10 Ala 384; Governor v. Lindsay, 14 Ala. 658; Governor v. Gibson, Ib. 326.

2890 (3187). **Credits to be indorsed.**—When a judgment has been satisfied in part, and an alias execution is issued, the clerk must indorse thereon the amount which had been previously made, with the date of its collection or payment.

2891 (3188). **When against plaintiff for his costs.**—When execution against the defendant is returned "no property found," execution may issue against the plaintiff, in the name of the clerk of the court, for all the costs created by him in obtaining his judgment.

Patterson v. Officers, 11 Ala. 740; McElhaney v. Flynn, 23 Ala. 819.

ARTICLE II.

PROPERTY SUBJECT TO EXECUTION.

2892 (3209). **Property subject to levy and sale under execution.**—Executions may be levied,—

1. On real property to which the defendant has a legal title, or a perfect equity, having paid the purchase-money, or in which he has a vested legal interest, in possession, reversion, or

remainder, whether he has the entire estate, or is entitled to it in common with others.

2. On personal property of the defendant (except things in action), whether he has the absolute title thereto, or the right only to the possession thereof for his own life, the life of another, or any shorter period; but this does not apply to a possession acquired by a bona fide hiring of chattels.

3. On an equity of redemption in either land or personal property. When any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities.

Lands in which defendant has vested interest, etc.—Goodlet v. Smithson, 5 Port. 245; Rhea v. Hughes, 1 Ala. 219; Laird v. Hopkins, 7 Ala. 115; McCaskle v. Amarine, 12 Ala. 17; Cheek v. Waldrum, 25 Ala. 152; Brock v. Yongue, 4 Ala. 584; Badger v. Lyon, 7 Ala. 564; Hill v. Jones, 65 Ala. 214; Thweat v. Stamps, 67 Ala. 96; Caldwell v. Lawler, 70 Ala. 296; Bernstein v. Humes, 71 Ala. 260; Callen v. Rottenberry, 76 Ala. 172. **Perfect equity.**—Smith v. Cockrell, 66 Ala. 64; Caldwell v. Parmer, 56 Ala. 405; Shaw v. Lindsey, 60 Ala. 344; You v. Flinn, 34 Ala. 409. **Equity of redemption.**—Shaw v. Lindsey, 60 Ala. 344; Junkins v. Lovelace, 72 Ala. 303; Acheson v. Broadhead, 56 Ala. 414; Childress v. Monette, 54 Ala. 317; Harbinson v. Harrell, 19 Ala. 753; McConeghy v. McCraw, 31 Ala. 447; Nabring v. Bank of Mobile, 58 Ala. 207; Kelly v. Longshore, 78 Ala. 203. **Personal property.**—Foster v. Mabe, 4 Ala. 402; Goode v. Longmire, 35 Ala. 668; McIntosh v. Walker, 17 Ala. 20; Thompson v. Mawhinney, Ib. 362; Johnson v. Culbreath, 19 Ala. 348; Thompson v. Thornton, 21 Ala. 808; Weir v. Davis, 4 Ala. 442. **Interest of partner in partnership.**—Winston v. Ewing, 1 Ala. 129; Andrews v. Keith, 34 Ala. 722; Daniel v. Owens, 70 Ala. 297; Moore v. Sample, 3 Ala. 319. **When money may be levied on.**—Barnett v. Bass, 10 Ala. 951.

2893. Growing or ungathered crop exempt.—No execution or other legal process must be levied upon a growing or ungathered crop of any description, except for the purpose of enforcing liens upon such crop for rent, advances, or labor, as prescribed by law. Feb. 13, 1879, p. 167.

ARTICLE III.

LIEN OF EXECUTION.

2894 (3210). **Extent of lien declared; how continued.**—A writ of fieri facias is a lien, only within the county in which it is received by the officer authorized to execute it, on the lands and personal property of the defendant subject to levy and sale, from the time only that the writ is received by such officer; which lien continues as long as the writ is regularly issued and delivered to such officer, without the lapse of an entire term.*

Bell v. King, 8 Port. 147; Campbell v. Spence, 4 Ala. 543; Hester v. Keith, 1 Ala. 316; Newcombe v. Leavitt, 22 Ala. 631; King v. Kenan, 38 Ala. 63; Childs v. Jones, 60 Ala. 352; Thames v. Rembert, 63 Ala. 562; Mathews v. Mobile Ins. Co., 75 Ala. 85; Chadwick v. Carson, 78 Ala. 116.

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*On February 28, 1887, an act was approved, entitled "An act to provide for the registration and lien of judgments and decrees for the payment of money," which is as follows:

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the plaintiff, or owner of any judgment or decree, rendered by any court of record for the payment of money, may file in the office of the judge of probate of any county in this state, a certificate of the clerk or register of the court by which such judgment or decree was rendered, showing the court which rendered the same, the amount and date thereof, and the amount of costs, the names of the parties, and the name of the plaintiff's attorney, which certificate shall be registered by the judge of probate of such county in a book to be kept by him for that purpose, which register shall also show the date of filing, and the name of the owner of such judgment or decree; and every judgment or decree, so filed and registered, shall be a lien upon all the property of the defendant in such county, which is sub-

2895 (3211). **Order of liens of different executions.**—The liens of executions, as between different judgment-creditors, and between judgment-creditors and purchasers from the defendant for valuable consideration, are declared to be: That if an entire term elapse between the return of an execution and the suing out an alias, the lien created by the delivery of the first execution to the sheriff is lost; but if an alias be sued out before the lapse of an entire term, and delivered to the sheriff before the sale of property under a junior execution, the lien created by the delivery of the first execution must be preferred.

Cary v. Gregg, 3 Stew. 433; McBroom v. Rives, 1 Stew. 72; Collingsworth v. Horn, 4 Stew. & Port. 237; Campbell v. Spence, 4 Ala. 543; Caperton v. Martin, 5 Ala. 217; Wood v. Gary, Ib. 43; Branch Bank v. Robinson, Ib. 623; Leach v. Williams, 8 Ala. 759; Langdon v. Brumby, 7 Ala. 53; Quinn v. Wiswall, Ib. 645; Dargan v. Waring, 11 Ala. 988; Patton v. Hayter, 15 Ala. 18; Branch Bank v. Broughton, Ib. 127; Otey v. Moore, 17 Ala. 280; Branch Bank v. Gordon, 15 Ala. 127; Albertson v. Goldsby, 28 Ala. 711; Sawyers v. Ware, 36 Ala. 676; Cotton v. Thompson, 25 Ala. 671; Toney v. Wilson, 51 Ala. 499; Bates v. Bailey, 57 Ala. 73; Ala. Gold Life Ins. Co. v. McCreary, 65 Ala. 127; Gamble v. Fowler, 58 Ala. 576; Barclay v. Smith, 66 Ala. 230; Carlisle v. Godwin, 68 Ala. 137; Keel v. Larkin, 72 Ala. 494; Mathews v. Mobile Ins. Co., 75 Ala. 85; Perkins v. Briarfield, 77 Ala. 403; Clark v Spencer 75 Ala. 53; Lancaster v. Jordan, 78 Ala. 197; Watson v. Steele, Ib. 361.

2896 (3212). **Lien destroyed by supersedeas or injunction.** The execution of a bond for an appeal, by which the judgment is suspended, or the execution of a bond by the defendant, upon the proper officer granting an injunction, supersedeas, or restraining order, destroys the lien created by the delivery of a fieri facias to the sheriff.

2897 (3213). **Execution levied after defendant's death.** A writ of fieri facias, issued and received by the sheriff during the life of the defendant, may be levied after his death, or an alias issued and levied, if there has not been the lapse of an entire term, so as to destroy the lien originally created.

Fryer v. Dennis, 3 Ala. 254; Boyd v. Dennis, 6 Ala. 55; Holloway v. Johnston, 7 Ala. 660; Henderson v. Gandy, 11 Ala. 431; Jones v. Swift, 12 Ala. 144; Collier v. Windham, 27 Ala. 291; Thompson v. Bondurant, 15 Ala. 346; Martin v. Branch Bank, Ib. 587; Swink v. Snodgrass, 17 Ala. 653; Hurt v. Nave, 49 Ala. 459; Hendon v. White, 52 Ala. 597; Dyer v. Graham, 58 Ala. 623; Childs v. Jones, 60 Ala. 352; Brown v. Newman, 66 Ala. 275; Keel v. Larkin, 72 Ala. 493; Sims v. Eslava, 74 Ala. 594; Meyer v. Hearst, 75 Ala. 390; Carlisle v. May, Ib. 504.

ARTICLE IV.

LEVY, SALE AND RETURN; VENDITIONI EXPONAS AND CONVEYANCE.

2898 (3189). **Time of receipt, and, if more than one, order of receipt, indorsed.**—The sheriff or other officer receiving an execution must indorse thereon the day, month and year of its receipt; and when more than one execution against the same defendant comes to his hands on the same day, if not

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ject to levy and sale under execution; and such lien shall continue for ten years from the date of such registration. The registration of such judgment or decree shall be notice to all persons of the existence of such lien.

"SEC. 2. *Be it further enacted*, That the probate judge shall be entitled to receive a fee of one dollar for each judgment so registered.

"SEC. 3. *Be it further enacted*, That the laws relating to the entry of credits and satisfaction of mortgages shall apply to the entry of credits and satisfaction of the liens created by this act."—Pamph. Acts, 1886–7, p. 99.

received at the same time, he must indorse thereon the order in which they are received.

Childs v. Jones, 60 Ala. 352; Hester v. Keith, 1 Ala. 316.

2899 (3190). **To be executed with diligence and returned.** He must execute the writ with diligence, and, if practicable, perform the mandate thereof, and make return of his acts to the clerk, three days before the first day of the return term of the writ.

"**Execute the writ with diligence.**"—Mason v. Watts, 7 Ala. 703; Leavitt v. Smith, Ib. 175; Whitsett v. Slater, 23 Ala. 626; Wilson v. Brown, 58 Ala. 62. **Return.**—Hardy v. Gascoigne, 6 Port. 447; Brown v. Baker, 9 Port. 503; Jones v. Davis, 2 Ala. 730; Crawford v. Bank of Mobile, 5 Ala. 55; Oswitchee v. Hope, Ib. 629; Campbell v. Spence, 4 Ala. 543; Cobb v. Cage, 7 Ala. 619; Leach v. Williams, 8 Ala. 759; Powell v. Governor, 9 Ala. 36; Smith v. Leavitt, 10 Ala. 92; Barnett v. Bass, Ib. 951; Cawthorn v. Knight, 11 Ala. 268; Gilchrist v. Branch Bank, 11 Ala. 408; Governor v. Gibson, 14 Ala. 326; Creagh v. Savage, Ib. 454; Forrest v. Camp, 16 Ala. 642; Governor v. Bancroft, Ib. 606; McKeagg v. Collehan, 13 Ala. 828; Casky v. Haviland, Ib. 314; Niolin v. Hamner, 22 Ala. 578; Patton v. Hamner, 28 Ala. 618; s. c., 33 Ala. 307; Wyatt v. Stewart, 34 Ala. 716; Houston v. Crutchfield, 22 Ala. 76; Wilson v. Strobach, 59 Ala. 488.

2900 (3191). **Return term.**—The return term of the writ is the term next after its date, unless issued less than fifteen days before court, in which case it is the term next thereafter.

Harrell v. Martin, 4 Ala. 650; Caskey v. Nitcher, 8 Ala. 622; Brown v. Hurt, 31 Ala. 146.

2901 (3192). **Reason for not executing stated.**—If the writ is not executed, or only executed in part, the reason why it is not executed, or only executed in part, must be stated in the return.

Baylor v. Scott, 2 Port. 315; Tarleton v. Bullard, 2 Ala. 638; Robertson v. Coker, 11 Ala. 466; Wilson v. Brown, 58 Ala. 62.

2902 (3193). **Return from another county; money sent therefrom.**—The return of an execution, or other process, by a sheriff of a county other than that from which the process issued, may be made through the public mail; and the certificate of the postmaster that it was placed in his office in time, by the usual course of mail, to reach the court-house of the county where the return has to be made, by the return-day of the writ, shall be presumptive evidence for the sheriff of the fact; but the sheriff is not authorized to send money by the mail without the consent of the plaintiff in execution.

2903 (3194). **Sheriff's duty when levy is on live stock.** When live stock is levied on and remains in the hands of the officer for sale, he must provide sustenance therefor; and it is his duty to hire out or employ the horses or other stock, if practicable, for their support; and if unable to do so, he must be allowed by the court a reasonable compensation for their support, which he may retain from the proceeds of the sale.

2904 (3195). **Description of property indorsed; notice of levy on land.**—When a levy is made on real or personal property, a full description thereof, with the date of the levy, must be indorsed upon, or appended to the execution; and when the levy is on real estate, personal notice thereof must be given to the defendant, or a notice thereof in writing left at his residence, if resident in the county; if not resident in the county, then by putting up a written notice at the court-house door; and the manner of giving notice must be stated in the return.

Webb v. Bumpass, 9 Port. 201; Toulmin v. Lesesne, 2 Ala. 359; Randolph v. Carlton, 8 Ala. 606; Barron v. Tart, 18 Ala. 668.

2905 (3196). **Bond of indemnity, when required.**—When a reasonable doubt exists whether the property levied on belongs to the defendant, or whether property alleged to be his is subject to levy and sale, the sheriff may require of the plaintiff, his agent, or attorney, a bond of indemnity; and if it is not given within ten days thereafter, he may restore the property to the defendant, if levied on, or decline to levy, if one has not been made; but he may be required to levy and sell at any time thereafter, on being indemnified.

Hall v. McHenry, 5 Port. 123; Minter v. Bigelow 9 Port. 481; Pickard v. Peters, 3 Ala. 493; Prewett v. Garrett, 6 Ala. 128; Cotton v. Thompson, 25 Ala. 671; McGehee v. Chandler, 15 Ala. 659; Otey v. Moore, 17 Ala. 280; Collier v. Windham, 27 Ala. 291; Alley v. Daniel, 75 Ala. 404.

2906 (3197). **Right to give such bond in case of several executions.**—If a party having the prior lien refuses to give such indemnity on demand of the sheriff, the party having the next lien in order may give it, and have the property sold for his benefit.

2907 (3198). **Time and place of sale.**—Lands, when levied on under execution from any court of record, must be sold on any Monday in the month at the court-house of the county; other property may be sold on any day, except Sunday, either at the court-house, the residence of the defendant, the place where levied on, or the neighborhood thereof, as may be most expedient. The sale may be continued from day to day, if rendered necessary by the inclemency of the weather, or from inability to conclude the sale in one day.

O'Conner v. Youngblood, 16 Ala. 718; Deloach v. State Bank, 27 Ala. 437; Atcheson v. Broadhead, 56 Ala. 414.

2908 (3199). **Notice of sale.**—In sales of personal property, notice must be given by advertisement at the court-house door for ten days, and also by publication in a newspaper, if one is published in the county, once a week for three successive weeks, previous to such sale; and in sales of real property, the publication in such newspaper must be once a week for three successive weeks, and by posting up notice for thirty days at the court-house door previous to the sale.

Brandon v. Snow, 2 Stew. 255; Wheeler v. Kennedy, 1 Ala. 292; Ray v. Womble, 56 Ala. 32; Holly v. Bass, 68 Ala. 206.

2909 (3200). **When property of principal first levied on.** When execution issues against two or more persons, any of whom were sureties on the contract before the judgment, the sheriff must levy on the property of the principal first, if any can be found in the county, on the application of such surety; and he may require of the surety affidavit of the fact of suretyship, which he must file with the execution.

2910 (3201). **Indorsement of, and receipt for collection.** When money is collected on an execution, the officer collecting it must indorse thereon, or append thereto the amount collected, specifying the judgment, interest thereon, and costs, with his own commissions, and sign his name thereto; and he must also, if required, receipt in like manner to the defendant.

2911 (3202). **Substitution of other property.**—The debtor has the right, on the day of sale, to substitute other property of equal value, not covered by any lien, in lieu of that levied on; which fact, and a description of the property substituted, must

be indorsed on, or appended to the execution, and the substituted property be sold in lieu of that levied on.

2912 (3203). **Notice of collection to be given.**—When the money, or any part thereof, has been made on an execution, the officer must give the plaintiff, his agent, or attorney, personal notice thereof within ten days thereafter, if resident in the county; if not resident in the county, and he knows the residence of them, or either of them, such notice may be sent by mail through the post-office.

2913 (3204.). **When excess of sale, or money collected paid to defendant.**—When, at an execution sale, the amount of the sale exceeds the judgment, interest and costs, the excess must be paid to the debtor, or his legal representative; and when money is paid or collected on an execution, the whole or any part of which is enjoined in chancery, the same must on demand be refunded to the debtor, or his legal representative, if it has not been paid over to the plaintiff, his agent, or attorney, without notice of the injunction.

2914 (3205). **Description of land sold and price indorsed on writ.**—When land is sold under execution, a description of the land and the price obtained for it must be indorsed upon, or appended to the writ by the officer making such sale.

Webb v. Bumpass, 9 Port. 201; Randolph v. Carlton, 8 Ala. 606; Deloach v. State Bank, 27 Ala. 437.

2915 (3206). **Return as to goods not sold; writ issues for sale thereof; form.**—When goods levied on remain in the hands of the officer unsold, it is his duty to make return of the fact, and thereupon the clerk must issue a writ for the sale thereof in substance as follows:

"The State of Alabama, ——— county. } To the sheriff of said county:

"You are hereby commanded to sell those goods and chattels of —— ——, which you have taken pursuant to our command, and which, according to your return, remain in your hands unsold, to satisfy —— —— the sum of —— dollars, recovered by him of the said —— —— by the judgment of our circuit court, held for the county of —— on the —— day of ——, 18—, and —— dollars, costs of suit; and make return of this writ and the execution thereof according to law.

"Witness my hand, this —— day of ——, 18—.

"—— —— Clerk."

Allen v. Best, 6 Ala. 234; Quinn v. Wiswall, 7 Ala. 645; Garey v. Hines, 8 Ala. 837; Weir v. Clayton, 19 Ala. 132; Millard v. Hall, 24 Ala. 210; Autrey v. Walters, 46 Ala. 476.

2916 (3207). **Conveyance by sheriff of lands sold by predecessor.**—When any sheriff, authorized by law to sell real estate, makes such sale, and dies or vacates his office before making a conveyance to the purchaser thereof, the court from which the writ issued, upon proof of the sale and of the payment of the purchase-money, may order the successor in office of the sheriff making such sale to make a conveyance of such lands to the purchaser; and such conveyance shall relate back to the date of the sale. If the purchaser is the plaintiff in the judgment, proof that he has credited, or the fact that he does credit on the record the defendant with the amount of the purchase-money, less the

necessary expenses and costs, is equivalent to proof of payment of the purchase-money.

Stewart v. Stokes, 33 Ala. 494; McCall v. White, 73 Ala. 562.

2917 (3208). **Sheriff required to make deeds.**—When real estate, or any interest therein, has been sold by any sheriff, he shall, upon compliance by the purchaser with the terms of sale, and the payment or tender of the fees for executing the deed therefor, execute a deed for such real estate, or interest therein sold, and deliver the same to the purchaser within five days after such sale.

ARTICLE V.

FORTHCOMING BONDS AND EXECUTIONS THEREON.

2918 (3214). **Personalty restored if forthcoming bond executed.**—When personal property is levied on by the sheriff, if the defendant executes bond with sufficient surety, in double the amount of the execution, payable to the plaintiff, and conditioned to deliver the property levied on to the proper officer by twelve o'clock, noon, of the day, and at the place appointed for the sale thereof, the sheriff must restore the property to the defendant.

Lunsford v. Richardson, 5 Ala. 618; Caperton v. Martin, Ib. 217; Vancleave v. Haworth, Ib. 188; Page v. Coleman, 9 Port. 275; Campbell v. Spence, 4 Ala 543; Anderson v. Rhea, 7 Ala. 104; Easley v. Walker, 10 Ala. 671; Sheppard v. Melloy, 12 Ala. 561; Branch Bank v. Darrington, 14 Ala. 192; Flournoy v. Mims, 17 Ala. 36; Branch Bank v. Curry, 13 Ala. 304.

2919 (3215). **Issue of execution on forfeiture of bond.**—If the property is not delivered according to the condition of the bond, the sheriff must return it forfeited within five days thereafter to the clerk's office out of which the execution issued, indorsing thereon a forfeiture of the bond; and it is then the duty of the clerk, without delay, to issue execution on the forfeited bond against all the obligors therein for the judgment and costs, upon which no security of any kind can be taken, which he must indorse on the writ.

Brooks v. Harrison, 2 Ala. 209; Taylor v. Powers, 3 Ala. 285; Jemison v. Cozens, Ib. 636; Mead v. Figh, 4 Ala. 279; Anderson v. Rhea, 7 Ala. 104; Meredith v. Richardson, 10 Ala. 828; Sheppard v. Melloy, 12 Ala. 561; Del Barco v. Branch Bank, Ib. 238; Nicholson v. Burke, 15 Ala. 353; Deloach v. State Bank, 27 Ala. 437.

2920 (3216). **Certain persons denied right to give forthcoming bonds.**—The two preceding sections do not apply to executions issued on judgments against sheriffs, coroners, or other officers of court, against whom judgment is obtained for failing to pay over money collected by, or paid to them in their official capacity; and the clerk must indorse on all such executions, "no security of any kind to be taken."

2921 (3217). **When value may be tendered for property destroyed.**—When property is restored to the defendant on the execution of a forthcoming bond, and the same dies, or is destroyed before the day for the delivery thereof, without fault on his part, the obligors in the bond may tender the value thereof to the plaintiff, his agent, or attorney; and if such tender is refused, the obligors in such bond may, on petition to the judge of the circuit court, supersede the same.

CHAPTER 15.

REVIVAL OF JUDGMENTS AND EXECUTIONS THEREON.

2922 (3173). **If execution is issued in a year, others may issue for ten.**—When execution has been issued on a judgment within a year after its rendition, and has not been returned satisfied, another execution may be issued at any time within ten years after the test of the last, without a revival of the judgment.

Sellers v. Hayes, 17 Ala. 749; Kingsland v. Forrest, 18 Ala. 519; Elliott v. Holbrook, 33 Ala. 659; Perkins v. Briarfield Co., 77 Ala. 410.

9223 (3174). **Scire facias when execution did not issue within a year.**—No execution shall issue on a judgment or decree of the circuit, chancery, or probate court, on which an execution has not been sued out within one year after its rendition, until the same has been revived by scire facias, if the defendant is a resident of the state, calling on him to show cause why the plaintiff should not have execution. When the defendant is a non-resident, the plaintiff must make affidavit of such non-residence, and that such judgment or decree is unsatisfied, and cause publication to be made, once a week for three successive weeks, in some newspaper published in the county, calling on the defendant to show cause why the plaintiff should not have execution on his judgment or decree; and a copy of the paper containing such publication must be forwarded by mail to the defendant, if his post-office is known. But if ten years have elapsed from the rendition of the judgment, without issue of the execution, or if ten years have elapsed since the date of the last execution issued, the judgment must be presumed satisfied, and the burden of proving it not satisfied is cast on the plaintiff.

Miller v. Shackelford, 16 Ala. 95; Barron v. Tart, 19 Ala. 78; Turner v. Dupree, Ib. 198; Harrison v. Jacks, 22 Ala. 549; Glass v. Glass, 24 Ala. 468; Sharp v. Herrin, 32 Ala. 502; Brevard v. Jones, 50 Ala. 222; Lowry v. Newsom, 51 Ala. 570; Betancourt v. Eberlin, 71 Ala. 462.

2924 (3175). **Scire facias barred in twenty years.**—No scire facias shall issue to revive a judgment or decree after the lapse of twenty years from its rendition.

Nabers v. Meredith, 67 Ala. 333.

2925 (3176). **Execution issues in favor of representative.** When a plaintiff dies after the rendition of a judgment or decree in his favor, and such judgment or decree is unsatisfied, execution may issue thereon in favor of the personal representative of such deceased plaintiff without a revival thereof; and when a judgment or decree is rendered in favor of an executor, administrator, guardian, or trustee, who dies, resigns, or is removed, or whose authority ceases from any cause, execution may issue in favor of the successor without a revival.

2926 (3177). **Revival of judgment or decree after plaintiff's death.**—When any plaintiff in a judgment or decree dies, the same may be revived in favor of his personal representative upon ten days' notice to the defendant. This may be done in

vacation, and if objection is made to the revival, appeal may be taken to the next term of the court, upon the defendant giving bond in twice the amount of the judgment.

Baker v. Ingersoll, 37 Ala. 503.

2927 (3178). **Assignee of judgment or decree may have execution.**—If the assignment of a judgment or decree is made or indorsed on the execution docket, or on the margin of the record of the judgment or decree, and is attested by the clerk, register, or judge of probate, the assignee may have execution thereon, in the name of the plaintiff, for his use, whether the plaintiff be living or dead.

2928 (3178). **Also scire facias.**—The assignee of a judgment or decree, if the assignment be in writing, may by scire facias have such judgment or decree revived in his name.

TITLE II.

CERTAIN SPECIAL PROCEEDINGS AND LIENS.

CHAPTER 1.—Attachments at law.
2.—Trial of right of property.
3.—Liens of mechanics and material-men.
4.—Liens in favor of blacksmiths and wood-workmen.
5.—Liens on ships, steamboats and other water-craft.
6.—Liens in favor of landlords.
7.—Lien of tenant in common on crop.
8.—Liens in favor of agricultural superintendents and laborers and railroad employes.
9.—Liens of livery-stable keepers.
10.—Liens in favor of owners of stallions, jacks, rams, ram-goats and boars.
11.—Summary judgments.
12.—Proceedings by sureties.
13.—Mandamus, prohibition, certiorari and other remedial writs of a supervisory nature.
14.—Actions to vacate charters of private corporations, and for usurpation or forfeiture of office.
15.—Ad quod damnum.
16.—Arbitration.
17.—Partition.
18.—Salvage.
19.—Injuries to trees and water-craft.

CHAPTER 1.

ATTACHMENTS AT LAW.

ARTICLE 1.—Issue of attachments.
2.—In what manner and on what property executed.
3.—Replevy of property.
4.—Ancillary attachments.
5.—Answer of garnishee and proceedings thereon.
6.—Pleadings, trial, judgment and execution.

ARTICLE I.

ISSUE OF ATTACHMENTS.

2929 (3252). **For what demands issued.**—Attachments may issue,—

1. To enforce the collection of a debt, whether it be due or not, at the time the attachment is taken out.

2. For any moneyed demand, the amount of which can be certainly ascertained.

3. To recover damages for a breach of contract, when the damages are not certain or liquidated.

4. When the action sounds in damages merely.

Subdivision 3.—Bozeman v. Rose, 40 Ala. 212; Moore v. Dickerson, 44 Ala. 485; Weaver v. Puryear, 11 Ala. 941. **Subdivision 4.**—Hadley v. Bryars, 58 Ala. 139. **When prematurely brought.**—Russell v. Gregory, 62 Ala. 454; Moore v. Dickerson. 44 Ala. 485. **Error to render judgment before debt is due.**—Jones v. Holland, 47 Ala. 732. **Will not lie to enforce statutory liability of wife's separate estate.** — Cauly v. Blue, 62 Ala. 77; McMullen v. Lockard, 64 Ala. 56; Lee v. Ryall, 68 Ala. 354. **Nor to enforce debt due by foreign corporation to its employe,** at place of its domicil, at suit of creditor of the latter.—L. & N. R. R. Co. v. Dooley, 78 Ala. 524.

2930 (3253). **Cases in which issued.**—And in the following cases:

1. When the defendant resides out of the state.
2. When the defendant absconds.
3. When the defendant secretes himself so that the ordinary process of law cannot be served on him.
4. When the defendant is about to remove out of the state.
5. When the defendant is about to remove his property out of the state, so that the plaintiff will probably lose his debt, or have to sue for it in another state.
6. When the defendant is about fraudulently to dispose of his property.
7. When the defendant has fraudulently disposed of his property.
8. When the defendant has moneys, property, or effects, liable to satisfy his debts, which he fraudulently withholds.

Subdivision 1.—Graham v. Ruff, 8 Ala. 171. **Subdivision 2.**—Middiebrook v. Ames, 5 Stew. & Port. 158; Pitts v. Burroughs, 6 Ala. 733. **Subdivision 3.**—Pitts v. Burroughs, 6 Ala. 733. **Subdivision 5.**—Stewart v. Coles, 46 Ala. 646; Napper v. Noland, 9 Port. 218. **Subdivision 6.**—Free v. Hukill, 44 Ala. 197; Hafley v. Patterson, 47 Ala. 271. **Subdivision 7.**—City National Bank v. Jeffries, 73 Ala. 183.

2931 (3254). **By what officers issued.**—In the first and second cases mentioned in the first section of this article, an attachment may be issued by any judge of the circuit court, returnable to any county in the state; or by the clerk of the city or circuit court, judge of probate, or any justice of the peace, or [1]a notary public exercising the jurisdiction of a justice of the peace, within their respective counties; in the third and fourth cases, only by a judge of the circuit court, judge of probate, or chancellor, returnable to any county.

[1] Dec. 12, 1882, p. 22.

Minniece v. Jeter, 65 Ala. 222; Vann v. Adams, 71 Ala. 473; Nordlinger v. Gordon, 72 Ala. 239.

2932 (3255). **Oath to be made.**—The officer, before issuing the attachment in the first two cases mentioned in the last section, must require the plaintiff, his agent, or attorney, to make oath of the amount of the debt or demand, and that it is justly due, and that one of the causes enumerated in the second section of this article exists; and that the attachment is not sued out for the purpose of vexing or harassing the defendant; and such oath must be reduced to writing and subscribed by the party making it.

Johnson v. Hale, 3 Stew. & Port. 331; Cannon v. Logan, 5 Port. 77; Hall v. Brazelton, 40 Ala. 406; s. c., 46 Ala. 359; Watts v. Womack, 44 Ala. 605; Sims v. Jacobson, 51 Ala. 186; Mitchell v. Pitts, 61 Ala. 219; Wright v. Smith, 66 Ala. 545.

2933 (3256). **Bond and surety also required.**—Such officer must further require the plaintiff, his agent, or attorney, to execute a bond in double the amount claimed, with sufficient surety,

payable to the defendant, with condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment.

Hadley v. Bryars, 58 Ala. 139; Copeland v. Cunningham 63 Ala. 394; Watts v. Rice, 75 Ala. 289.

2934 (3257). **When additional affidavit required.**—When an attachment is applied for in the cases provided for in the third and fourth subdivisions of the first section of this article, the judge or chancellor, before issuing it, must require the plaintiff, his agent, or attorney, in addition to the affidavit and bond required in other cases, to make affidavit in writing of the special facts and circumstances, so as to enable him to determine the amount for which a levy must be made; which sum may, at the discretion of the court, be reduced at the return term of the attachment, on affidavit of the defendant, and the levy released to the amount of such reduction.

Bozeman v. Rose, 40 Ala. 212; Hadley v. Bryars, 58 Ala. 139.

2935 (3258). **Attachment by a non-resident against another.**—A non-resident of this state may sue out an attachment against a non-resident for an existing debt or ascertained liability; but the plaintiff, his agent, or attorney, is required, in addition to the oath necessary in other cases, to swear that, according to the best of his knowledge, information, and belief, the defendant has not sufficient property within the state of his residence wherefrom to satisfy the debt; and must also give bond as in other cases, with surety resident in this state.

Cobb v. Force, 6 Ala. 468; Cobb v. Miller, 9 Ala. 499; Hazard v. Jordan, 12 Ala. 180; Jones v. Lawrence, 36 Ala. 618; Mitchell v. Pitts, 61 Ala. 219.

2936 (3259). **Notice to non-resident defendant.**—When an attachment is sued out against a non-resident of the state, the writ shall be returned to the clerk of the court as soon as levied upon the property of the defendant, and thereupon the clerk shall cause a notice of the attachment and levy on the defendant's property to be advertised, once a week for three successive weeks, in some newspaper, a copy of which must be sent by mail to the defendant, if his residence is known or can be ascertained; and if such publication is perfected twenty days before the next term of the court, the case shall stand for trial at that term; otherwise, at the succeeding term, or any other term after the perfection of such publication twenty days prior thereto. As amended, Feb. 23, 1883, p. 147.

Grier v. Campbell, 21 Ala. 327; Dow v. Whitman, 36 Ala. 604; Brinsfield v. Austin, 39 Ala. 227.

2937 (3260). **Notice of levy when defendant resident of state.**—Notice of the levy of the attachment shall be given in writing by the sheriff, or other person who makes such levy, to the defendant in person, or notice thereof in writing left at his residence, if resident in the county; and if not resident in the county, but a resident of the state, then by posting up a written notice at the court-house door, and by sending a copy of the same by mail, addressed to the defendant at the post-office nearest his residence.

Rice v. Clements, 57 Ala. 191; Peebles v. Weir, 60 Ala. 413; Betancourt v. Eberlin, 71 Ala. 462.

2938 (3261). **Corporations may sue out attachments.**—Corporations, either foreign or domestic, are entitled to process of attachment for the recovery of the debts or ascertained demands due them, the president, cashier of the corporation, or an agent or attorney thereof, making the affidavit and executing bond as in other cases.

2939 (3262). **How security for costs may be given.**—When an attachment is sued out in favor of a non-resident, or a foreign corporation, security for the costs of the suit may be taken and approved by the officer issuing the same, or may be indorsed with his approval on the attachment.

See citations to section 2858.

2940 (3263). **Attachments against foreign corporations.** Process of attachment may issue against foreign corporations, having property in this state, for the recovery of debts, or to recover damages for a breach of contract when the damages are not certain or liquidated, or in cases where the action sounds in damages merely, in the same manner, and subject to the same rules as in case of natural persons residing without this state.

Cental Mfg. Co. v. Stoven, 45 Ala. 594.

2941 (3264). **Form; no objection taken for want of.**—The form of attachment must be in substance as follows, but no objection shall be taken for any defect in form, if the essential matters are set forth:

"The State of Alabama, } To any sheriff of the State of Ala-
——— county. } bama:

"Whereas A. B. (or C. D., as the agent or attorney of A. B., as the case may be,) hath complained on oath to me, E. F., judge of the circuit court of said state (or justice of the peace, or judge of the probate court, or clerk of the circuit court of said county, or as the case may be), that G. H. is (or will be, as the case may be,) justly indebted to the plaintiff in the sum of —— dollars, and the plaintiff having made affidavit and given bond as required by law in such cases, you are hereby commanded to attach so much of the estate of G. H. as will be of value to satisfy the said debt and costs, according to the complaint; and such estate, unless replevied, so to secure that the same may be liable to further proceedings thereon, to be had at the next term of the circuit court for the county of ——, to be held at the court-house thereof; when and where you must make known how you have executed this writ.

"Witness my hand, this, etc. E. F., Clerk."

Blair v. Miller, 42 Ala. 308; Peebles v. Weir, 60 Ala. 413.

2942 (3265). **Return of bond and affidavit.**—The bond and affidavit must be returned by the officer issuing the attachment to the court to which the attachment is returnable.

2943 (3266). **When issued and executed on Sunday.**—Attachments may issue and be executed on Sunday, if the plaintiff, his agent, or attorney, in addition to the oath prescribed for the issue of such process, make affidavit that the defendant is absconding, or is about to abscond, or is about to remove his property from the state, and give the bond required in this article.

2944 (3267). **Provisions of chapter applicable to private corporations.**—The provisions of this chapter are applicable to all private corporations, and all affidavits or answers, required to be made under any of its provisions, may be made by the president, cashier, secretary, or any other duly authorized agent of such corporation; and such corporations may do and be dealt with under its provisions, in the same manner as if they were natural persons.

See citations to section 2945.

ARTICLE II.

IN WHAT MANNER AND ON WHAT PROPERTY EXECUTED.

2945 (3268). **How attachment executed.**—Attachments may be levied on real estate, whether a fee-simple or any less legal estate, or on personal property of the defendant; or may be executed by summoning any person indebted to the defendant, or liable to him on a contract for the delivery of personal property, or for the payment of money which may be discharged by the delivery of personal property, or on a contract payable in personal property, or a person having in his possession, or under his control, any money or effects belonging to the defendant; and the officer executing the writ must indorse such levy or service thereon, and, if practicable, take the property into his possession, unless replevied as hereinafter prescribed.

What not subject to levy.—Horton v. Smith, 8 Ala. 73; Thompson v. Thornton, 21 Ala. 808; Read v. Sprague, 34 Ala. 101; Goode v. Longmire, 35 Ala. 668; Central Mining Co. v. Stoven, 45 Ala. 594; Starnes v. Allen, 58 Ala. 317. **May be levied on land on which execution had been levied.**—Johnson v. Burnett, 12 Ala. 743. **Levy on pair of shoes, if of any value, sufficient.**—Thornton v. Winter, 9 Ala. 613. **Levy not sufficient, if colorable or fictitious.**—Thornton v. Winter, 9 Ala. 613; Grier v. Campbell, 21 Ala. 327. **When return sufficiently shows property levied on belongs to defendant.**—Bickerstaff v. Patterson, 8 Port. 245; Kirksey v. Bates, 1 Ala. 303; Miller v. McMillan, 4 Ala. 527; Fleming v. Burge, 6 Ala. 373; Lucas v. Godwin, Ib. 831. **What necessary to levy on personal property.** Abrams v. Johnson, 65 Ala. 465. **When against several defendants,** may be levied on joint property, or on property of any one of the defendants; but it only brings in those who have **an interest therein.**—Hadley v. Bryars, 58 Ala. 139. **Levy on exempt property brings defendant into court.**—Ib. **Effect of death of defendant and insolvency.**—McEachin v. Reid, 40 Ala. 410; Seals v. Holloway, 77 Ala. 344. **Effect of death of defendant on levy on land.**—Phillips v. Ash, 63 Ala. 414; Lipscomb v. McClellan, 72 Ala. 151. **Service of garnishment a levy.**—Thompson v. Allen, 4 Stew. & Port. 184; Cleaveland v. State, 34 Ala. 254. **Although garnishee not indebted.**—Flournoy v. Lyon, 70 Ala. 308. **Second mortgagee cannot, by garnishment, on first mortgagee,** as debtor of mortgagor, subject rents and profits received by garnishee in excess of his debt.—Toomer v. Randolph, 60 Ala. 356. **Choses in action, in possession of garnishee,** cannot be reached by garnishment. Jones v Norris, 2 Ala. 526; Levison v. Waganer, 76 Ala 412. **Generally; what subject to garnishment.**—Jones v. Crews, 64 Ala. 368. **Attachment cannot be levied by garnishing municipal corporation.**—Mayor v. Rowland, 26 Ala. 498; Clark v. Mobile Commissioners, 36 Ala. 621. **Description of property.**—Green v. Pyne, 1 Ala. 235; Toulmin v. Lesesne, 2 Ala. 359.

2946 (3269). **Garnishee cited to appear and answer.**—Such person is called the garnishee, and the summons must be to answer, at the return term upon oath, whether, at the time of the service of the garnishment, or at the time of making his answer, or at any time intervening the time of serving the garnishment and making the answer, he was indebted to the defendant, and whether he will not be indebted in future to him by a contract then existing, and whether by a contract then existing he is liable to him for the delivery of personal property, or for the

payment of money which may be discharged by the delivery of personal property, or which is payable in personal property, and whether he has not in his possession, or under his control, money or effects belonging to the defendant, a copy of which citation he must return executed, together with the attachment and levy.

See citations to sections 2974 and 2976.

2947 (3270). **Levied on joint or separate estate or interest.** An attachment may be levied on the joint or separate estate of joint obligors, promissors, or partners, whether resident or non-resident.

Pearce v. Shorter, 50 Ala. 318; Hadley v. Bryars, 58 Ala. 139; Watts v. Rice, 75 Ala. 289.

2948 (3271). **Executors and administrators.**—Executors and administrators may be garnished for a debt due by the testator or intestate to the defendant, and may commence a suit by attachment in their representative character.

Moore v. Stainton, 22 Ala. 831; Jackson v. Shipman, 28 Ala. 488; Dudley v. Falkner, 49 Ala. 148.

2949 (3272). **Garnished for amounts due legatees and distributees.**—Executors and administrators may be garnished for debts due the legatees, or distributees; but no judgment can be rendered against them until a settlement of the estate, unless they assent to the legacy, or admit assets to pay the amount claimed, or some portion thereof, out of the distributive share of the debtor.

Corbitt v. Pynes, 45 Ala. 261. See, also, citations to preceding section.

2950 (3273). **Money in hands of officers or attorneys.** Money in the hands of an attorney at law, sheriff, or other officer, may be attached; and in the case of officers of the court, the money must be paid into court, to abide the result of the suit, unless the court otherwise direct.

Edmondson v. DeKalb, 51 Ala. 103; Pruitt v. Armstrong, 56 Ala. 306; Underhill v. Calhoun, 63 Ala. 216 (overruling Smoot v. Hart, 33 Ala. 69).

2951 (3275). **Money in the hands of a trustee.**—Money or effects of the defendant, in the hands of a trustee, may be attached and held subject to the validity of the instrument creating the trust, or the excess remaining in the trustee's hands after the execution of the trust, if valid; but if the deed be held void, the trustee, if not guilty of actual fraud, may retain for a debt due himself, and must be protected so far as he has acted in good faith under the trust before the levy of the attachment.

Price v. Masterson, 35 Ala. 483; Lightfoot v. Rupert, 38 Ala. 666; Hall v. Heydon, 41 Ala. 242.

2952 (3276). **Debts or demands in suit subject to garnishment.**—A debt or demand which is subject to garnishment may be reached and subjected, though suit may be pending thereon; and if the suit be not pending in the court from which the garnishment issues, the court, on proof by the garnishee of the pendency of the garnishment, must, on the rendition of judgment, stay execution until notified by the clerk of the court in which the garnishment or attachment is instituted, that final judgment has been rendered; in which case it must make

the appropriate order according as the judgment is rendered for the plaintiff or defendant.

S. & N. R. R. Co. v. Falkner, 49 Ala. 115; Calhoun v. Whittle, 56 Ala. 138.

2953 (3277). **Attachments executed in any county.**—The attachment may be executed in any county of the state by the sheriff of the county in which the property or garnishee may be found; and the sheriff must take and hold the property attached, unless replevied, subject to the order of the court in which the attachment is pending.

2954 (3278). **Branch writs.**—Branch writs of attachment may issue to any county of the state, directed to any sheriff of the State of Alabama, to be executed as in the preceding section.

2955 (3313). **Alias writs; new writs of garnishment.** Alias writs of attachment, or new writs of garnishment, may be issued by the clerk without a renewal of the bond or affidavit, in cases where no property, or an insufficient amount thereof to satisfy the plaintiff's demand, has been found, or when, pending the suit, the plaintiff wishes to garnish other persons.

2956 (3279). **Levy by constables.**—When an attachment is issued by a justice of the peace, if the amount of the debt does not exceed the penalty of the constable's bond, the justice may, by indorsement on the process, direct it to be executed by the constable of the precinct, who shall return the same to the court to which it is returnable. As amended, Jan. 22, 1885, p. 95.

2957 (3280). **Lien of attachment.**—The levy of an attachment, or service of a garnishment, creates a lien in favor of the plaintiff.

McRae v. McLean, 3 Port. 138; Pond v. Griffin, 1 Ala. 678; Hale v. Cummings, 3 Ala. 398; Lamar v. Gunter, 39 Ala. 324; McEachin v. Reid, 40 Ala. 410; May v. Courtney, 47 Ala. 185; Crowe v. Reid, 57 Ala. 281; McClelland v. Lipscomb, 56 Ala. 255; Lipscomb v. McClelland, 72 Ala. 151; Griggs v. Banks, 59 Ala. 311; Woolfolk v. Ingram, 53 Ala. 11; Martin v. Lile, 63 Ala. 406; Phillips v. Ash, Ib. 414; Cordaman v. Malone, Ib. 556; Mayberry v. Morris, 62 Ala. 113; Scarborough v. Malone, 67 Ala. 570; Seals v. Holloway, 77 Ala. 344.

2958 (3281). **Sale of perishable property under order of court.**—If the property levied on be perishable, it must be sold by order of the court, on motion of either party, and the proceeds of the sale retained by the sheriff to await the decision of the cause, unless the court otherwise direct.

2959 (3282). **When sold without order of court.**—If the property levied on be of so perishable a nature that it will deteriorate greatly in value, or be destroyed, before the meeting of the court, or if the charge of keeping it be very great, it is the duty of the sheriff, if not replevied, to sell it at public auction, returning the facts and the money to the court.

Griel v. Hunter, 40 Ala. 542.

2960 (3283). **When plaintiff may receive proceeds of sale upon executing refunding bond.**—When property levied on under an attachment has been sold pending the suit, on motion of the plaintiff, the judge of the court to which the attachment is returnable must, at any time after thirty days from the levy, in term time or vacation, make, and cause to be entered upon the minutes of the court, an order directing the officer having in his hands the proceeds of sale, after reserving an amount, to be fixed in the order, to cover the probable costs and charges in

the cause, to pay over to the plaintiff, or his attorney, the balance of such proceeds, not exceeding the amount of the plaintiff's demand, to be stated in the order, upon his giving bond in double the amount of the money to be paid over, payable to the defendant, with sufficient surety, to be approved by such officer, and with condition, that if he is cast in the suit, he will pay into court the amount so paid over to him, with interest, or if he recovers in the suit, and the recovery is for a sum less than the amount so paid over to him, he will pay into court the excess, with interest; and upon the execution of such bond, such officer shall pay over to the plaintiff, or his attorney, the proceeds of sale as directed in the order. Such order shall not, however, be made, if, upon the hearing of the motion, or at any time prior thereto, a claim to the property levied on is interposed by any person not a party to the suit, or the defendant denies under oath the existence of the plaintiff's demand. Notice of such motion, and of the time and place of hearing the same, must be served on the defendant, or his attorney, ten days before the hearing thereof; or if the defendant resides out of the state, and has no attorney resident of the county, such notice must be given by publication in some newspaper published in the county, once a week for three successive weeks.

2961 (3283). **Proceedings on forfeiture of such bond; when money to be paid defendant.**—The officer taking such bond shall forthwith return the same to the clerk of the court in which the suit is pending, with his indorsement thereon, showing how he has executed such order, and specifying the amount paid over to the plaintiff, or his attorney, thereunder, and the date of such payment; and if the plaintiff is cast in the suit, or if he recovers, and his recovery is for a less sum than the amount paid him under such order, and he fails for thirty days after the date of the rendition of the judgment to pay into court the money required by the condition of his bond to be paid, the clerk shall indorse the bond forfeited, and issue execution thereon against the obligors for the amount so paid to the plaintiff, or his attorney, as shown by the indorsement of the officer taking the bond, with interest from the date of such payment, if the plaintiff was cast in the suit; or, if the plaintiff recovered, and his recovery was for a less sum than the amount so paid, for the difference between the amount recovered and the amount received by him, with interest from the date of payment. If the plaintiff complies with the condition of the bond by paying the money into court, the same must be paid to the defendant.

2962 (3284). **Amount so received by sheriff recovered on one day's notice.**—The sheriff and his sureties, or either of them, may be proceeded against by motion, on one day's notice, at the instance of the plaintiff, or of the defendant, if the plaintiff fail in the action, for any money received for the sale of perishable property; and judgment rendered against him or them for the amount, and five per cent. a month from the time of the demand.

James v. Moseley, 47 Ala. 299; McArthur v. Dane, 61 Ala. 539.

2963 (3285). **Bond of indemnity.**—When a doubt exists as

to the title of the defendant to personal property which the sheriff is required to levy upon, he may demand indemnity from the plaintiff.

ARTICLE III.

REPLEVY OF PROPERTY.

As amended, March 1, 1881, p. 54, sec. 1.

2964 (3289). **Replevy of property levied on.**—The defendant in attachment, or, in his absence, a stranger, may replevy the goods or chattels attached, or any part thereof, by executing bond, with sufficient sureties, payable to the plaintiff, in double the value of the property replevied, to be determined by the officer making the levy, with condition that if the defendant fail in the action, the principal in the bond, or his sureties, will return the specific property attached within thirty days after the judgment; which bond must be returned with the other papers of the cause.

Cary v. Gregg, 3 Stew. 433; McRae v. McLean, 3 Port. 138; Kinney v. Mallory, 3 Ala. 626; Rives v. Wilborne, 6 Ala. 45; Braley v. Clark, 22 Ala. 361; Cooper v. Peck, Ib. 406; Mitchell v. Ingram, 38 Ala. 395; Kirk v. Morris, 40 Ala. 225; Morris v. Hall, 41 Ala. 510; Woolfolk v. Ingram, 53 Ala. 11; Russell v. Locke, 57 Ala. 420; Adler v. Potter, Ib. 571; Peebles v. Weir, 60 Ala. 413; Agnew v. Leath, 63 Ala. 345; Cordaman v. Malone, Ib. 556; Rhodes v. Smith, 66 Ala. 174; Scarborough v. Malone, 67 Ala. 570; Brown v. Hamil, 76 Ala. 506.

Ib. sec. 2.

2965 (3291). **Forfeiture of replevy bond; execution thereon.**—When the property replevied is not delivered in thirty days after judgment against the defendant in attachment, the sheriff shall return the bond forfeited, and execution must be issued thereon against the principal and sureties for the amount of the value of the property replevied, as fixed by the sheriff or other officer making the levy, with interest thereon from the date of the bond, and for the cost of the replevy and of the execution, unless such value is greater than the amount of the judgment against the defendant, in which case the execution shall be for the amount of such judgment and costs.

Dunlap v. Clements, 18 Ala. 778; Braley v. Clark, 22 Ala. 361; Cooper v. Peck, Ib. 406; Rhodes v. Smith, 66 Ala. 174; Maas v. Long, 70 Ala. 237.

2966 (3292). **If property dies, or is destroyed, value received in discharge of bond.**—If any of the property so replevied should die or be destroyed without fault or negligence on the part of the person in possession, before the day for the delivery thereof, the obligors in the bond may tender the value to the plaintiff, his agent, or attorney; and if such tender is refused, such obligors may obtain relief by supersedeas.

Burgess v. Sugg, 2 Stew. & Port. 341; Dunlap v. Clements, 18 Ala. 778; Glover v. Taylor, 41 Ala. 124; Woolfolk v. Ingram, 53 Ala. 11.

ARTICLE IV.

ANCILLARY ATTACHMENTS; GARNISHMENT.

2967 (3319, 3320). **Attachment in aid of pending suit.** When a suit has been commenced by the suing out of a summons, whether such summons has been executed or not, the plaintiff, his agent, or attorney, may, at any time before judgment, sue out an attachment in aid of such suit, upon making

affidavit and giving bond as is required on the issue of original attachments; and all proceedings on such attachments must be conducted as are proceedings on original attachments; and such attachment may be sued out in any case in which an original attachment may be sued out, and may be issued by the officer having authority to issue original attachments.

2968 (3219). **Garnishment in aid of pending suit.**—A garnishment may issue in aid of a pending suit, at any time before judgment, whether the summons has been executed or not; but if the suit be for the recovery of damages merely, or for the recovery of uncertain or unliquidated damages for a breach of contract, such garnishment must be issued only on the order of a judge of probate, or chancellor, or judge of the circuit or city court, in which such suit is pending, after the plaintiff has made the special affidavit of the facts and circumstances of the case required by section 2934 (3257), and such judge or chancellor has prescribed the penalty of the bond to be given by the plaintiff; and in all cases the plaintiff, upon the issue of the garnishment, must give bond with surety, payable and with condition as in case of original attachments.*

2969 (3321). **Attachment may issue when resident defendant evades service of summons.**—When a summons has been returned "not found" as to all or any of the defendants, residents of the county, if the plaintiff, his agent, or attorney, make affidavit that the defendant has evaded the service of the process, the court must direct an attachment to issue, returnable to the next term of the court, and the cause must in all respects proceed, as against such defendant, as if originally commenced by attachment.

2970 (3322). **Proceedings in such case.**—The plaintiff may, notwithstanding such attachment, proceed to judgment against any of the defendants on whom process was served; but a judgment and satisfaction of the debt or claim abate the attachment at the costs of the plaintiff.

As amended, Dec. 6, 1882, p. 6

2971 (3218). **Garnishment on judgment.**—Process of garnishment may issue on a judgment or decree on which execution can issue without bond or security, and may be sued out by the assignee of such judgment or decree.

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*On 9th December, 1886, an act was approved, amending section 3219 of the Code of 1876; and the section, as amended, reads as follows: "And a creditor, his agent, or attorney, may obtain garnishment against any person supposed to be indebted to the defendant in any cause, when a summons or summons and complaint have issued, by making affidavit before the justice of the peace or clerk of the court to which the summons is returnable, or before any other officer authorized to administer oaths, that such person is supposed to be indebted to, or have effects of the defendant in his possession or under his control, and he believes process of garnishment against such person is necessary to obtain satisfaction of such claim; and also making affidavit to the amount due from the defendant to such creditor, and giving bond as in attachment cases; and thereupon the justice of the peace or clerk of the court must issue process of garnishment, returnable at the same time the summons or summons and complaint are returnable, or at any subsequent term of the court, before the final termination of the suit; and shall also issue notice to the defendant of the issuance of said garnishment, which notice shall be served at least ten days before judgment against the garnishee."—Pamph. Acts, 1886–7, p. 141.

By reason of the re-arrangement of the subject of attachments, the section, as amended, could not be *substituted* in this Code, and hence, it is given in a note. In the act as published, there is a misprint. In the third line, supra, *firm* should be *person*, as will be seen by reference to the original manuscript.

2972 (3220). **Subscription for stock in a corporation subject to garnishment.**—A judgment creditor of a corporation, having execution returned "no property found," may sue out a garnishment to reach and subject the unpaid subscription of any stockholder in such corporation, without giving bond or security.

Curry v. Woodward, 44 Ala. 305; s. c., 50 Ala. 258; s. c., 53 Ala. 371.

2973. Special affidavit.—Garnishment must not issue to obtain satisfaction of a judgment or decree, or in aid of a pending suit commenced in the ordinary form, without an affidavit made and filed by the plaintiff, his agent, or attorney, that process of garnishment is believed to be necessary to obtain satisfaction of such judgment or decree, or of the judgment which may be recovered in such pending suit, and that the person to be summoned as garnishee has, or is believed to have, in his possession, or under his control, money or effects belonging to the defendant, or that he is, or is believed to be, indebted to the defendant, or to be liable to him on a contract for the delivery of personal property, or on a contract for the payment of money which may be discharged by the delivery of personal property, or which is payable in personal property; and it is not an objection to an affidavit for garnishment that all or any of these matters are stated in the alternative.

ARTICLE V.

ANSWER OF GARNISHEE AND PROCEEDINGS THEREON.

2974 (3293). **Answer of garnishee.**—The garnishee must answer under oath according to the terms of the citation or garnishment, within the first three days of the return term of the attachment or garnishment, and may, if required by the plaintiff, be examined orally in the presence of the court.

Robinson v. Rapelye, 2 Stew. 86; Scales v. Swan, 9 Port. 163; Foster v. White, Ib. 221; Stubblefield v. Hagerty, 1 Ala. 38; Gaines v. Beirne, 3 Ala. 114; Price v. Thomason, 11 Ala. 875; Wicks v. Branch Bank, 12 Ala. 594; Jones v. Howell, 16 Ala. 695; Bostwick v. Beach, 18 Ala. 180; Lewis v. DuBose, 29 Ala. 219; Easton v. Lowery, Ib. 454; Hollingsworth v. Hammond, 30 Ala. 668; Mathews v. Robinson, 33 Ala. 320; Saunders v. Garrett, Ib. 454; Curry v. Woodward, 44 Ala. 305; Corbitt v. Pynes, 45 Ala. 258; Wright v. Swanson, 46 Ala. 708; Security Asso'n v. Weems, 69 Ala. 584. See, also, citations to section 2976.

2975 (3222). **Answer of corporation; by whom made.**—No person shall answer, on behalf of any corporation, any process of garnishment, unless he shall make affidavit that he is the duly authorized agent of the corporation to make such answer.

M. & C. R. R. Co. v. Whorley, 74 Ala. 264.

2976 (3294). **Judgment on answer; when execution suspended.**—If the garnishee answers and admits indebtedness to the defendant, judgment thereon must be rendered against him, after judgment against the defendant, for the amount so admitted, if less than the amount of the judgment against the defendant; if more or equal thereto, for the amount thereof; and if the debt or demand is not then payable, execution must be suspended until its maturity.

Garnishment a legal, not an equitable remedy.—Thomas v. Hopper, 5 Ala. 442; Price v. Masterson, 35 Ala. 483; Godden v. Pierson, 42 Ala. 370; Henry v. Murphy, 54 Ala. 246; Harris v. Miller, 71 Ala. 26; Henderson v. Ala. Gold Life Ins.

Co., 72 Ala. 32. **Only such demands can be reached as debtor could recover of garnishee** in debt or indebitatus assumpsit.—Powell v. Sammons, 31 Ala. 552; Walke v. McGehee, 11 Ala. 273; s. c., 15 Ala. 183; Cook v. Walthall, 20 Ala. 334; Nesbitt v. Ware, 30 Ala. 69; Godden v. Pierson, 42 Ala. 370; Henderson v. Ala. Gold Life Ins. Co., 72 Ala. 32; Alexander v. Pollock, 72 Ala. 137; Nat. Com'l Bank v. Miller, 77 Ala. 168. **Only such debts can be subjected** as debtor might recover by suit at law in his own name.—Harrell v. Whitman, 19 Ala. 135. **When legal demand cannot be reached.**—Harris v. Miller, 71 Ala. 26. **When defendant has no cause of action against garnishee,** the plaintiff cannot recover against the latter, "unless he can show some fraud or collusion, by which his legal rights are prejudiced."—Alexander v. Pollock, 72 Ala. 137. **When answer authorizes judgment.** Pressnal v. Mabry, 3 Port. 105; Smith v. Chapman. 6 Port. 365; Baker v. Moody, 1 Ala. 312; Self v. Kirkland, 24 Ala. 276; Hall v. Magee, 27 Ala. 414; S. & N. R. R. Co. v. Falkner, 49 Ala. 115; N. O., M. & C. R. R. Co. v. Long, 50 Ala. 498; Leslie v. Merrill, 58 Ala. 322; Security Loan Asso'n v. Weems, 69 Ala. 584; Wooldridge v. Holmes, 78 Ala. 568. **When record sufficient to support.**—Bostwick v. Beach, 18 Ala. 80. **When answer does not authorize judgment.**—King v. Murphy, 1 Stew. 228; Pressnall v. Mabry, 3 Port. 105; Smith v. Chapman, 6 Port. 365; Foster v. White, 9 Port. 474; Stubblefield v. Hagerty, 1 Ala. 38; Mims v. Parker, Ib. 421; Foster v. Walker, 2 Ala. 177; Fortune v. State Bank, 4 Ala. 385; Buford v. Welborn, 6 Ala. 818; Price v. Thomason, 11 Ala. 875; Wicks v. Branch Bank, 12 Ala. 594; Hall v. Magee, 27 Ala. 414; Saunders v. Garrett, 33 Ala. 454; M. & O. R. R. Co v. Whitney, 39 Ala. 468; Jones v. Carew, 64 Ala. 368; Alexander v. Pollock, 72 Ala. 137. **Judgment cannot be rendered subject to a set-off set up in answer.**—Allen v. Morgan, 1 Stew. 9. **No judgment can be rendered against garnishee,** until plaintiff recovers judgment against defendant.—Gaines v. Beirne, 3 Ala. 114. **Garnishee, on answering, continues before the court until judgment.**—Bostwick v. Beach, 18 Ala. 80. **In garnishment on judgment,** in whose name judgment against garnishee should be taken.—Jackson v. Shipman, 28 Ala. 488. **When judgment informal.**—Randolph v. Little, 62 Ala. 396. **When may be set aside at subsequent term.**—Corbitt v. Pynes, 45 Ala. 258. **Payment after service,** under order of court of foreign jurisdiction, no defense.—M. & O. R. R. Co. v. Whitney, 39 Ala. 468. **Satisfaction of judgment,** a discharge of original debt. Gunn v. Howell, 35 Ala. 145. **Effect of garnishment against several on joint demand.**—Locket v. Child, 11 Ala. 640; Pearce v. Shorter, 50 Ala. 318. **Any number of persons may be joined as garnishees,** whether indebted to defendant jointly or severally.—Curry v. Woodward, 50 Ala. 258; s. c., 53 Ala. 371; Pearce v. Shorter, 50 Ala. 318. **Continuance for further answer,** when future indebtedness disclosed. Security Loan Asso'n v. Weems, 69 Ala. 584. **Mere irregularities cannot be set up by garnishee.**—Smith v. Chapman, 6 Port. 365; Hollingsworth v. Hammond, 30 Ala. 668; Gunn v. Howell, 35 Ala. 144; Security Loan Asso'n v. Weems, 69 Ala. 584. **But may raise objection that attachment is void.**—Dew v. Bank, 9 Ala. 323; Flash v. Paul, 29 Ala. 141; Mathews v. Sands, Ib. 136. **When he may show satisfaction of judgment on which writ issued.**—Thompson v. Wallace, 3 Ala. 132. **He cannot, however, question the ownership of the judgment.**—Jackson v. Shipman, 28 Ala. 488. **When he cannot claim discontinuance.**—Curry v. Woodward, 53 Ala. 371. **He may set up invalidity of fraudulent conveyance.**—Henry v. Murphy, 54 Ala. 246. **As to what debts he must answer.**—Central Plank R. Co. v. Sammons, 27 Ala. 380; N. O., M. & C. R. R. Co. v. Long, 50 Ala. 498; Roby v. Labuzan, 21 Ala. 60. **Judgment against garnishee** must specify amount of plaintiff's judgment against the defendant.—Faulks v. Heard, 31 Ala. 516; Chambers v. Yarnell, 37 Ala. 400; Whorley v. M. & C. R. R. Co., 72 Ala. 20. **When corporation waives defective service,** and fact that answer was not accompanied by statutory affidavit.—M. & C. R. R. Co. v. Whorley, 74 Ala. 264. See, also, citations to preceding section.

2977. Judgment on demand payable in personal property, or on contract to deliver personal property.—If the garnishee is liable for the delivery of personal property, or for the payment of money which may be discharged by the delivery of personal property, the value of the property must be ascertained, and a judgment rendered against the garnishee that, if he do not, by a day to be fixed by the court, which must be a day after the maturity of such contract, deliver such property to the sheriff or other lawful officer, he must pay the value thereof, or the sum of money which was payable therein; and, upon the return of the sheriff, or such other officer, that such property was not delivered, or the value thereof, or such sum of money was not paid to him, as required by the judgment, execution must be issued

for the ascertained value of such property, or for the sum of money payable therein, if the same is less than the amount of the judgment against the defendant in the original suit; if more, or equal thereto, for the amount thereof. If such property is delivered to the sheriff, or other lawful officer, he must proceed to a sale thereof.

2978 (3295, 3296, 3297). **Judgment and proceedings on answer admitting possession of effects of defendant.**—If the garnishee admits the possession of effects of the defendant, the subject of levy and sale under legal process, judgment of condemnation must be rendered, that such effects be delivered up on demand, after the rendition of judgment in favor of the plaintiff in the original suit, or so much thereof as may be necessary to satisfy the judgment, and the sheriff must make sale thereof. If the garnishee fails to deliver such effects to the sheriff on demand, he must make return thereof to the clerk, who must thereupon issue an execution against the garnishee in favor of the plaintiff for the amount of the judgment and costs. If, however, such failure is without fault or negligence on the part of the garnishee, he may tender to the plaintiff, his agent, or attorney, the value of such effects, and if such tender is refused, he may obtain relief by supersedeas.

2979. Judgment when garnishee admits possession of money.—If the garnishee admits the possession of money belonging to the defendant, he must pay the same, or so much thereof as may be necessary to satisfy the plaintiff's demand and costs, into court, to await the order of the court; and if he fails to make such payment, he is liable as if he had admitted an indebtedness for the amount of such money.

2980 (3298). **Proceedings on failure to answer.**—If the garnishee fails to appear and answer, a conditional judgment must be rendered against him for the amount of the plaintiff's claim, as ascertained by his judgment, to be made absolute, unless he appears within the first three days of the next term and answer; and a notice of the judgment must be issued to him by the clerk, to be served on him, as other process, by the sheriff. If he fails to appear at the next term, after notice executed, or if two notices be returned not found by the sheriff of the county in which the garnishment was executed, the judgment must be made absolute.

Scales v. Swan, 9 Port. 163; Dickerson v. Walker, 1 Ala. 48; Jones v. Hart, 2 Ala. 73; Blair v. Rhodes, 5 Ala. 648; Dew v. Bank, 9 Ala. 323; Lowery v. Clements, Ib. 422; Morris v. Russell, 20 Ala. 357; Drane v. King, 21 Ala. 556; Wood v. Russell, 22 Ala. 645; Bonner v. Martin, 37 Ala. 83; Goode v. Holcombe, Ib. 94.

2981 (3299). **Contest of answer by plaintiff.**—The plaintiff, his agent, or attorney, may controvert the answer of the garnishee, by making oath, at the term the answer is made, that he believes it to be untrue; and thereupon, an issue must be made up, under the direction of the court, in which the plaintiff must allege in what respect the answer is untrue; and if required by either party, a jury must be impaneled to try such issue.

Thompson v. Allen, 4 Stew. & Port. 184; Foster v. Walker, 2 Ala. 177; Hazard v. Franklin, Ib. 349; Betts v. Brown, 5 Ala. 414; Graves v. Cooper, 8 Ala. 811; Myatt v. Lockhart, 9 Ala. 91; Lockhart v. Johnson, Ib. 223; McDaniel v. Reed, Ib. 615; Moore v. Jones, 13 Ala. 296; Marston v. Carr, 16 Ala. 325; Harrell v. Whitman, 19 Ala. 135; s. c., 20 Ala. 519; Nesbitt v. Ware, 30 Ala. 69; Price v. Mazange, 31 Ala. 701; Sevier v. Throckmorton, 33 Ala. 512; Godden v. Pierson, 42 Ala. 370; Fowler v. Williamson, 52 Ala. 16; Ex parte Opdyke, 62 Ala. 68.

2982 (3300). **Contest of answer by defendant.**—The defendant, upon the coming in of the answer, may allege that the garnishee is indebted to him in a larger sum than he has admitted, or is otherwise liable to him on a demand, the subject of garnishment, or that he holds money or effects of the defendant not admitted in his answer, which being reduced to writing, setting forth particularly in what respect the answer is deficient, and being sworn to, an issue must thereupon be made up, under the direction of the court, which must be tried by a jury, if required by either party; but such controversy shall not prevent the plaintiff from taking judgment upon the answer of the garnishee.

Edmondson v. DeKalb Co., 51 Ala. 103; Ex parte Opdyke, 62 Ala. 68.

2983 (3301). **Judgment when answer is not sustained.** If such issue is found against the garnishee, judgment must be rendered against him in favor of the plaintiff, if necessary to satisfy his claim or judgment against the defendant, or in favor of the defendant, if such judgment has been satisfied.

2984 (3302). **On suggestion by garnishee of claim by another, such claimant made a party.**—When the garnishee, by his answer as originally filed, or by any supplemental answer thereafter, at any time before final judgment against him, alleges that he has been notified that another person claims title to, or an interest in the debt or demand, or money, or effects, which by his answer he has admitted to be due or owing, or to be in his possession, the court must suspend proceedings against the garnishee, and cause a notice to issue to such person to appear at the next term of the court, and contest with the plaintiff the right to such debt, demand, money, or effects.

Payne v. Mayor, 4 Ala. 333; Goodwin v. Brooks, 6 Ala. 836; Covington v. Kelly, Ib. 860; Blackman v. Smith, 8 Ala. 203; Camp v. Hatter, 11 Ala. 151; Johnson v. Burnett, 12 Ala. 743; Moore v. Jones, 13 Ala. 296; Evans v. Norman, 14 Ala. 662; Mock v. King, 15 Ala. 66; Connoley v. Cheeseborough, 21 Ala. 166; Andrews v. Bank, Ib. 576; Easton v. Lowry, 29 Ala. 455; Saunders v. Garrett, 33 Ala. 454; Smoot v. Eslava, 23 Ala. 659; M. & O. R. R. v. Whitney, 39 Ala. 468; Molton v. Escott, 50 Ala. 77; Boyd v. Cobbs, Ib. 82; Fowler v. Williamson, 52 Ala. 16; Simmons v. Guyon, 57 Ala. 111; Winslow v. Bracken, Ib. 368; Ex parte Opdyke, 62 Ala. 68; Saller v. Ins. Co., Ib. 221; Clark v. Few, Ib. 243; McMullen v. Lochard, 64 Ala. 56; Security Asso. v. Weems, 69 Ala. 584; Flournoy v. Owens, 74 Ala. 446; National Com. Bank v. Miller, 77 Ala. 168; McAbee v. Parker, 78 Ala. 573.

2985 (3303). **Proceedings to try such claim.**—If he appears, he must be required to propound his claim in writing, and make oath thereto, upon which the plaintiff must take issue in law, or in fact, and the issue in fact must be tried by a jury, if required by either party. If the issue be found for the plaintiff, judgment must be rendered against the garnishee on his answer; if for the contestant, the garnishee must be discharged.

Simpson v. Tippin, 5 Stew. & Port. 208; Goodwin v. Brooks, 6 Ala. 836; Camp v. Hatter, 11 Ala. 151; Scott v. Stallsworth, 12 Ala. 25; Moore v. Jones, 13 Ala. 296; Evans v. Norman, 14 Ala. 662; Grady v. Hammond, 21 Ala. 427; Brooks v. Hildreth, 22 Ala. 469; Rowland v. Plummer, 50 Ala. 182; Fowler v. Williamson, 52 Ala. 16; Winslow v. Bracken, 57 Ala. 368; Ex parte Opdyke, 62 Ala. 68; Saller v. Ins. Co., Ib. 221; Seals v. Holloway, 77 Ala. 344; Reynolds v. Collins, 78 Ala. 94.

2986 (3304). **When a contestant is a non-resident.**—If the contestant be a non-resident, the contest must be stayed six

months, and the same proceedings had as in the case of a non-resident defendant.

Sheppard v. B ford, 7 Ala. 90.

2987 (3305). **If resident contestant be not found, judgment against the garnishee.**—If two notices to the resident contestant be returned "not found," judgment must be rendered against the garnishee on his answer.

Simmons v. Guyon, 57 Ala. 111.

2988 (3306). **Such issues do not change the jurisdiction.** The interposition of these collateral issues does not affect the jurisdiction of the court obtained by levy of the attachment.

2989 (3307). **Bills of exceptions in such cases.**—Upon the trial of these collateral issues, either party may reserve any question by bill of exceptions for revision; and judgment for costs must be rendered against the unsuccessful party.

2990 (3308). **Appeals.**—An appeal lies to the supreme court at the instance of the plaintiff, the defendant, the garnishee, the contestant, or claimant.

2991 (3309). **Garnishee recovers his costs on a discharge.** When the answer of the garnishee is not controverted, or, if controverted, is found for him, he is allowed the pay of a juror during his attendance, for which execution may issue; if there be no effects, then from the plaintiff, for which he may have judgment and execution.

2992 (3310). **Proceedings on death of garnishee or contestant.**—If the garnishee die after he has been summoned as garnishee, and pending the litigation, the proceedings may be revived against his legal representatives; so, if the contestant die, after notice to appear and contest with the plaintiff.

Linn v. Taylor, 42 Ala. 303.

2993 (3316). **Effect of judgment of condemnation as between garnishee and defendant.**—The judgment condemning the debt, or demand, or money, or effects, to the satisfaction of the plaintiff's demand, is conclusive as between the garnishee and the defendant to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment, which he may do in his own name; and if such judgment is superseded by bond, and the garnishee is notified of the fact, he is not permitted to discharge such judgment pending the appeal.

Montgomery Gas Co. v. Merrick, 61 Ala. 534.

2994. Garnishment; nature of.—A garnishment, as the word is employed in this Code, is process to reach and subject money or effects of a defendant in attachment, or in a judgment or decree, or in a pending suit commenced in the ordinary form, in the possession or under the control of a third person, or debts owing such defendant, or liabilities to him on contracts for the delivery of personal property, or on contracts for the payment of money which may be discharged by the delivery of personal property, or on a contract payable in personal property; and such third person is called the garnishee.

ARTICLE VI.

PLEADINGS, TRIAL, JUDGMENT AND EXECUTION.

2995 (3323, 3324). **Complaint, when to be filed; time of trial.**—The plaintiff must, within the first three days of the return term of the attachment, file his complaint, and the cause stands for trial at such return term, if the levy is made and notice thereof is given twenty days before the commencement of such term; but if the attachment is issued upon a demand not then due, the cause shall not stand for trial, nor shall the plaintiff be required to file his complaint, until such demand is due and payable.

Jones v. Howard, 42 Ala. 483; Penn v. Edwards, Ib. 655; Jones v. Holland, 47 Ala. 732; Rice v. Clements, 57 Ala. 191; Peebles v. Weir, 60 Ala. 413.

2996 (3325). **Practice in such suits.**—If the defendant appears and pleads, the cause proceeds as in suits commenced by summons and complaint; if he fails to appear, or appearing, fails to plead within the time required by law, the plaintiff may take judgment by default or nil dicit, and may execute a writ of inquiry, if necessary.

2997 (3314). **When attachment may be abated.**—An attachment issued without affidavit and bond, as prescribed in this chapter, may be abated on plea of the defendant, filed within the first three days of the return term.

Lowry v. Stowe, 7 Port. 483; P. & M. Bank v. Andrews, 8 Port. 404; Findlay v. Pruitt, 9 Port. 195; Alford v. Johnson, Ib. 320; Lowe v. Derrick, Ib. 415; Jackson v. Stanley, 2 Ala. 326; Reynolds v. Bell, 3 Ala 57; Scott v. Macy, Ib. 250; Bank v. Lewis, 4 Ala. 599; Conklin v. Harris, 5 Ala. 213; Jones v. Pope, 6 Ala. 154; Roberts v. Burke, Ib. 348; Fleming v. Burge, Ib. 373; Burt v. Parish, 9 Ala. 211; Jordan v. Hazard, 10 Ala. 221; s. c., 12 Ala. 180; Kirkman v. Patton, 19 Ala. 32; Ex parte Putnam, 20 Ala. 592; Vandyke's case, 24 Ala. 81; Gill v. Downs, 26 Ala. 670; Stetson v. Goldsmith, 30 Ala. 602; Dow v. Whitman, 36 Ala. 604; Hall v. Brazelton, 40 Ala. 406; s. c., 46 Ala. 359; Bank v. Colby, Ib. 435; Free v. Howard, 44 Ala. 195; Sims v. Jacobson, 51 Ala. 186; DeBardeleben v. Crosby, 53 Ala. 363; Brown v. Coats, 56 Ala. 439; Watson v. Auerbach, 57 Ala. 354; Johnston v. Hannah, 66 Ala. 127; Tommey v. Gamble, Ib. 469; Wright v. Smith, Ib. 545; Busbin v. Ware, 69 Ala. 279; Fitzsimmons v. Howard, Ib. 590; Rich v. Thornton, Ib. 473.

2998 (3315). **Attachment law; how construed; when attachment cannot be abated.**—The attachment law must be liberally construed to advance the manifest intent of the law; and the plaintiff, before or during the trial, must be permitted to amend any defect of form or of substance in the affidavit, bond, or attachment; and no attachment must be dismissed for any defect in the affidavit, if the plaintiff, his agent, or attorney, will make a sufficient affidavit, or for any defect in the bond, or for want of a bond, if the plaintiff, his agent, or attorney, is willing to give or substitute a sufficient bond.

Ware v. Todd, 1 Ala. 199; Graham v. Ruff, 8 Ala. 171; Blair v. Miller, 42 Ala. 308; Bruner v. Kinsel, Ib. 493; Watts v. Womack, 44 Ala. 605; Free v. Howard, Ib. 195; Hall v. Brazelton, 46 Ala. 359; s. c., 40 Ala. 406; Paulhaus v. Leber, 54 Ala. 91; Shield v. Dothard, 59 Ala. 595; Peebles v. Weir, 60 Ala. 413; Mitchell v. Pitts, 61 Ala. 219; Flexner v. Dickerson, 65 Ala. 129; Tommey v. Gamble, 66 Ala. 469; Mohr v. Chaffe, 75 Ala. 387.

2999 (3317, 3318). **Grounds of issue not traversable; suit on bond, when brought, and what damages recoverable.** The defendant must not deny or put in issue the cause for which the attachment issued; but, at any time within three years of the suing out of the attachment, before or after the suit is deter-

mined, he may commence suit on the attachment bond, and may recover such damages as he has actually sustained, if the attachment was wrongfully sued out; and, if sued out maliciously as well as wrongfully, the jury may, in addition, give vindictive damages.

Actions in case, and on attachment bond, for damages for wrongfully and vexatiously suing out attachment.—Hill v. Rushing, 4 Ala. 212; Herndon v. Forney, Ib. 243; Pitts v. Borroughs, 6 Ala. 733; Kirksey v. Jones, 7 Ala. 622; Gilmer v. Weir, 8 Ala. 72; Flanagan v. Gilchrist, Ib. 620; Alexander v. Hutchison, 9 Ala. 825; Boyd v. Martin, 10 Ala. 700; Jones v. Kirksey, Ib 839; McCullough v. Walton, 11 Ala. 492; Havis v. Taylor, 13 Ala. 324; Donnell v. Jones, Ib. 490; s. c., 17 Ala. 689; Melton v. Troutman, 15 Ala. 535; Sharpe v. Hunter, 16 Ala. 765; White v. Wyley, 17 Ala. 167; Marshall v. Betner, Ib. 832; Yarbrough v. Hudson, 19 Ala. 653; Forrest v. Collier, 20 Ala. 175; Tiller v. Shearer, Ib. 527; Seay v. Greenwood, 21 Ala. 491; Dickson v. Bachelder, Ib. 699; Sackett v. McCord, 23 Ala. 851; Goldsmith v. Pickard, 27 Ala. 142; Hudson v. Howlett, 32 Ala. 478; Floyd v. Hamilton, 33 Ala. 235; O'Grady v. Julian, 34 Ala. 88; McKellar v. Couch, Ib. 336; Benson v. McCoy, 36 Ala. 710; Jones v. Lawrence, Ib. 618; Wood v. Barker, 37 Ala. 60; Lockhart v. Wood, 38 Ala. 631; Lewis v. Paul, 42 Ala. 136; Metcalf v. Young, 43 Ala. 643; Gabel v. Hammerwell, 44 Ala. 336; Stewart v. Cole, 46 Ala. 646; Adams v. Olive, 48 Ala. 551; Burton v. Smith, 49 Ala. 293; Ryall v. Marx, 50 Ala. 31; Swanner v. Swanner, Ib. 66; Tucker v. Adams, 52 Ala. 254; Durr v. Jackson, 59 Ala. 203; Higgins v. Mansfield, 62 Ala. 267; Copeland v. Cunningham, 63 Ala. 394; Dothard v. Sheid, 69 Ala. 135; Pollock v. Gantt, Ib. 373; Flournoy v. Lyon, 70 Ala. 308; City Bank v. Jeffries, 73 Ala. 183; Jackson v. Smith, 75 Ala. 97.

3000 (3311). **Judgment in attachment suspended until trial of collateral issues.**—No judgment can be rendered against the defendant in attachment, when a claim has been interposed to try the right of property, or when the answer of the garnishee is contested, or a contest has arisen about the title to, or interest in the debt or demand, money or effects garnished, until these questions are settled; unless other property or effects of the defendant be attached or garnished, about which no contest has arisen.

3001 (3312). **Property condemned restored.**—If the plaintiff do not obtain judgment against the defendant in attachment, all property condemned, where a claim for the trial of the right of property had been interposed, must be restored to the claimant at the costs of the plaintiff.

3002 (3274). **Judgments against personal representatives.** No judgment can be rendered against an executor or administrator upon his answer in attachment or garnishment, until eighteen months after the grant of letters testamentary, or of administration.

3003 (3326). **Process for satisfaction of judgment.**—If the judgment of the plaintiff be not satisfied by the property attached, or by the garnishee, execution must issue thereon, which may be levied on, and satisfied by any property of the defendant; and the plaintiff may proceed to a sale of the property attached by a venditioni exponas, or by an ordinary writ of execution.

CHAPTER 2.

TRIAL OF RIGHT OF PROPERTY.

As amended, Feb. 28, 1887, p. 150.

3004 (3341). **Personal property levied on under execution; when delivered to claimant.**—When an execution is levied on personal property claimed by any person, not a party to the writ, he is entitled to try the right to such property before a sale thereof, upon affidavit being made by himself, his agent, or attorney, that he has a just claim to the property levied on, and upon executing a bond, with two good and sufficient sureties, payable to the plaintiff, in double the value of the property so levied on and claimed, the value thereof to be determined by the sheriff, but in no case is such bond to be more than double the amount of the execution so levied, with condition to have the property forthcoming for the satisfaction of the judgment, if it be found liable therefor, and also for the payment of such costs and damages as may be recovered for putting the claim in for delay; whereupon the property levied on must be delivered to the possession of the claimant; *Provided*, This right of trial to property shall include any person who holds a lien upon, or equitable title to such property; *And provided further*, That this rule shall apply to trials of the right of property both in circuit and justice courts.

The proceeding authorized, a suit.—Jacott v. Hobson, 11 Ala. 434; P. & M. Bank v. Borland, 5 Ala. 531; McAdams v. Beard, 34 Ala. 478. **What the commencement thereof.**—McAdams v. Beard, 34 Ala. 478. **Who may maintain.**—McGrew v. Hart, 1 Port. 175; Marrs v. Gantt, Minor, 406; Cotten v. Thompson, 21 Ala. 574; Braley v. Clark, 22 Ala. 361; Cooper v. Peck, Ib. 406; Loeb v. Manasses, 78 Ala. 555 (declaring Meyer v. Sulzbacher, 75 Ala. 423, on this point, a dictum); King v. Hill, 20 Ala. 133; Strode v. Clark, 12 Ala. 621. **What title necessary to support.**—Frow v. Downman, 11 Ala. 880; Foster v. Smith, 16 Ala. 92; Thomas v. DeGraffenreid, 17 Ala. 602; Abraham v. Carter, 53 Ala. 8; McKeithen v. Pratt, Ib. 116; Lehman v. Warren, Ib. 535; Boswell v. Carlisle, 55 Ala. 554; Treadway v. Treadway, 56 Ala. 390; Starnes v. Allen, 58 Ala. 316; Block v. Maas, 65 Ala. 211; Columbus Works v. Renfro, 71 Ala. 577. **Sufficiency of affidavit.** McGregor v. Hall, 3 Stew. & Port. 397; Gayle v. Bancroft, 22 Ala. 316; Rives v. Wilborne, 6 Ala. 45. **Affidavit and bond essential to jurisdiction.**—Mobile Ins. Co. v. Teague, 78 Ala. 147; Walker v. Ivey, 74 Ala. 475; Graham v. Hughes, 77 Ala. 590.—**Bond and liability thereon.**—King v. Walton, 3 Port. 289; Bradford v. Dawson, 2 Ala. 203; Elliott v. Gray, 4 Stew. & Port. 168; Hughes v. Garrett, 8 Ala. 483; Babcock v. Williams, 9 Ala. 150; Henderson v. Bank, 11 Ala. 855; Del Barco v. Bank, 12 Ala. 238; Gayle v. Bancroft, 17 Ala. 351; Robertson v. Patterson, Ib. 407; Gayle v. Bancroft, 22 Ala. 316; s. c., Ib. 648; Madden v. Hooper, 42 Ala. 397. **Property regarded as in custody of the law.**—Rapier v. Paper Co., 64 Ala. 330. **Levy of other executions thereon.**—Langdon v. Brumby, 7 Ala. 53; Spencer v. Godwin, 30 Ala. 355; McLemore v. Benbow, 19 Ala. 76; Babcock v. Williams, 9 Ala. 150; Branch Bank v. Broughton, 15 Ala. 127; Kemp v. Porter, 7 Ala. 138; Hobson v. Kissane, 8 Ala. 357. **Title acquired by purchasers from parties.**—Jackson v. Gewin, 9 Ala. 114; Atwood v. Peason, Ib. 656; Spencer v. Godwin, 30 Ala. 355. **Execution of bond estops claimant from denying levy.**—Henderson v. Bank, 11 Ala. 855. **Death or destruction of property does not prevent recovery on bond.** Derrett v. Alexander, 25 Ala. 265; Madden v. Hooper, 42 Ala. 397. **Distinct from original suit.**—Gray v. Raiborn, 53 Ala. 40; Seamans v. White, 8 Ala. 656. **Revivor.**—Gayle v. Bancroft, 22 Ala. 316.

3005 (3342). **Return of papers; issue made up between parties.**—If the execution issued from the circuit court, or court of like jurisdiction, the sheriff must return the affidavit and bond to the next term of such court, when an issue must be made up between the plaintiff in execution and the claimant,

in which the former must allege that the property claimed is the property of the defendant in execution, and is liable to its satisfaction.

Issue.—Lucas v. Hitchcock, 2 Ala. 287; Hall v. Dargan, 4 Ala. 696; Phelan v. Fancher, 5 Ala. 449; P. & M. Bank, v. Willis, Ib. 770; Branch Bank v. Parker, Ib. 731; Langdon v. Brumby, 7 Ala. 53; Starnes v. Allen, 58 Ala. 316; Dryer v. Abercrombie, 57 Ala. 497; Lehman v. Warren, 53 Ala. 535; Shahan v. Herzberg, 73 Ala. 59. **Outstanding title in third party.**—Starnes v. Allen, 58 Ala. 316; Treadway v. Treadway, 56 Ala. 390; Frow v. Downman, 11 Ala. 880; Foster v. Smith, 16 Ala. 192; Thomas v. Degraffenreid, 17 Ala. 602; McGrew v. Hart, 1 Port. 175. **Defects in original proceedings; when not available to claimant.** Bettis v. Taylor, 8 Port. 564; Huff v. Cox, 2 Ala. 310; Fryer v. Dennis, Ib. 144; Harrell v. Floyd, 3 Ala. 16; Jackson v. Bain, 74 Ala. 328; Pace v. Lee, 49 Ala. 571; Sandlin v. Anderson, 76 Ala. 403. **Otherwise, if process void.**—Jackson v. Bain, 74 Ala. 328; Sandlin v. Anderson, 76 Ala. 403.

3006 (705). **Return and proceedings when execution issued from probate or chancery court.**—If the execution issued from the probate or chancery court, the sheriff must return the original execution to the court issuing the same, with an indorsement thereon of the interposition of such claim; and he must return a copy of the execution and of the returns thereon, the affidavit and bond to the next term of the circuit court, or other court of like jurisdiction, of his county, where the trial of the right of property must be had according to the provisions of this chapter.

3007 (3343). **Burden of proof on plaintiff in execution; damages for delay.**—Upon the trial of the issue, the burden of proof is on the plaintiff in execution; and if the jury subject the property to the payment of the execution, they must, as far as practicable, assess the value, at the time of the trial, of each article separately; and if it be shown on the trial that the claim was interposed for delay, they must also assess such damages as the plaintiff may be entitled to, not less than ten per centum on the execution.

Burden of proof.—Elliott v. Stocks, 67 Ala. 290; Shahan v. Herzberg, 73 Ala. 59; Grady v. Hammond, 21 Ala. 427; Foster v. Smith, 16 Ala. 192. **Process, levy, etc., as evidence.**—Thomas v. Henderson, 27 Ala. 523; Taliaferro v. Lane, 23 Ala. 369; Yarborough v. Morse, 9 Ala. 382; Mayer v. Clark, 40 Ala. 259; Gayle v. Bancroft, 22 Ala. 316. **Assessing value of property.**—Powell v. Haden, 21 Ala. 745; Seamans v. White, 8 Ala. 656; Phelan v. Fancher, 5 Ala. 449; Burnett v. Maxey, 9 Port. 410. **Verdict and judgment.**—Brumby v. Langdon, 10 Ala. 747; Wallace v. Rhea, Ib. 451; Lewis v. Lewis, Minor, 95; Powell v. Haden, 21 Ala. 745; Lee v. Bryan, 3 Ala. 278; Mundine v. Perry, 2 Stew. & Port. 130; Williams v. Jones, 2 Ala. 314; Gray v. Raiborn, 53 Ala. 40; Townsend v. Brooks, 76 Ala. 308; Langworthy v. Goodall, Ib. 325. **Effect and conclusiveness of judgment.**—Oden v. Stubblefield, 2 Ala. 684; Williams v. Jones, Ib. 314; Roberts v. Heim, 27 Ala. 678; Lenoir v. Wilson, 36 Ala. 600. **When only one of several execution creditors entitled to recovery.**—Burnett v. Handley, 8 Ala. 685. **Proceedings same under venditoni exponas as under attachment.**—Yarborough v. Morse, 9 Ala. 382. **Damages for delay.** Murphy v. Butler, 75 Ala. 381.

3008 (3344). **When bond indorsed forfeited; execution thereon.**—If judgment is rendered against the claimant, and he fails to deliver the property to the sheriff within thirty days thereafter to satisfy the plaintiff's execution, the sheriff must indorse the bond forfeited; and thereupon the clerk must issue an execution against all the obligors therein for the amount of the plaintiff's judgment, if that is less than the value of the property as assessed by the jury, or for the amount of such assessed value, if less than the amount of the judgment, and also for the damages, if any were assessed, and the costs of the trial of the right of property.

Allen v. Hayes, 1 Stew. 10; Elliott v. Gray, 4 Stew. & Port. 168; Garnett v. Ro-

per, 10 Ala. 842; Patton v. Hamner, 33 Ala. 307; Langworthy v. Goodall, 76 Ala. 325. **When bond not statutory.**—King v. Walton, 3 Port. 289.

3009 (706). **Return of execution on bond, when original execution issued from probate or chancery court.**—If the original execution issued from the probate or chancery court, the execution on the forfeited bond must be made returnable to such court, as other process returnable thereto; of which, and the time of its receipt by the sheriff, he must give the judge of such probate court, or the register of such chancery court, as the case may be, written notice, which shall be presumptive evidence of the fact against such sheriff.

3010 (3345). **Proceedings when property levied on under execution from another county.**—When the levy is made in a different county from that in which the judgment is rendered, if a claim is interposed to the property, it is the duty of the sheriff to return the original execution to the court from which it issued, with his return thereon of the interposition of the claim, and true copies of the bond and affidavit, certified by him; and he must return the bond and affidavit, and a true copy of the execution, certified by him, to the circuit court, or other court of like jurisdiction, of his own county, where the trial of the right of property must be had; and the copies thus required to be made, certified by the sheriff to be true copies of the originals, must be received in lieu of, and have, in all respects, the same effect as the originals.

Henderson v. Bank, 11 Ala. 855; Ex parte Dunlap, 71 Ala. 73.

3011 (3346). **Proceedings on forfeiture of bond in such case.** If, in the case provided for in the preceding section, the property is found liable to the plaintiff's execution, and is not delivered up to the sheriff of the county in which the trial of the right of property was had, within thirty days thereafter, he must indorse the bond forfeited, and thereupon the clerk must issue execution as in other cases of the trial of the right of property, except that he must make the same returnable to the court from which the original execution issued; of which, and the time of its receipt by the sheriff, he must give the proper officer of such court written notice; which shall be presumptive proof of the fact against the sheriff; and he must also issue a separate execution for the costs of his own court.

See citations to preceding section.

3012 (3290). **Claim to property levied on under attachment; proceedings thereon.**—If any personal property, on which an attachment has been levied, is claimed by any person not a party to the writ, on making affidavit and executing bond as required when property levied on under execution is claimed, the property must be delivered to the claimant; and thereupon the attachment and such bond and affidavit must be returned by the sheriff in the same manner, and, except as otherwise provided in this chapter, the same proceedings must be had thereon, as in the trial of the right of property levied on under execution.

Pace v. Lee, 49 Ala. 571; Gray v. Raiborn, 53 Ala. 40; Winslow v. Bracken, 57 Ala. 368; Cordaman v. Malone. 63 Ala. 556; Scarborough v. Malone, 67 Ala. 570; Rhodes v. Smith, 66 Ala. 174; Maas v. Long, 70 Ala. 237; Ex parte Dunlap, 71 Ala. 73; Jackson v. Bain, 74 Ala. 328; Meyer v. Sulzbacher, 75 Ala. 423. See, also, citations to preceding sections of this chapter.

3013 (3291). **Forfeiture of claim bond in attachment cases, and execution thereon.**—When property levied on under an attachment, and delivered to a claimant, is not by the claimant delivered to the sheriff within thirty days after judgment against him, the sheriff must return the bond forfeited; and, upon the recovery of judgment by the plaintiff against the defendant in attachment, execution must be issued upon such forfeited bond within the time required for the issue of executions on judgments.

3014 (3290). **Affidavit administered by officer levying process.**—The affidavit to be made by the claimant, on interposing his claim under this chapter, may be made before the officer levying the process.

3015 (3347). **Levy on other property not prevented.**—The interposition of a claim and the trial of the right of property do not prevent the plaintiff from levying on other property of the defendant in the process.

3016 (3348). **Damages against sheriff released by claim.** A claim interposed for the trial of the right of property is a release by the claimant in favor of the sheriff from all damages for seizing such property.

Towns v. Alford, 2 Ala. 378; Lenoir v. Wilson, 36 Ala. 600.

3017 (3349). **Claim by mortgagee; payment of secured debt by plaintiff.**—When personal property mortgaged to another is levied on under execution or attachment, the mortgagee, or his assignee, may try the right of property as provided in this chapter; but the plaintiff in the process may pay to the mortgagee, or his assignee, the amount owing on the debt secured by the mortgage; and in such case the property shall be sold, as well for the payment of the mortgage debt as for the satisfaction of the process, the proceeds of sale to be first applied, after payment of costs, to reimburse the plaintiff the amount so paid by him to such mortgagee or assignee.

Floyd v. Morrow, 26 Ala. 353; Boswell v. Carlisle, 70 Ala. 244.

CHAPTER 3.

LIENS OF MECHANICS AND MATERIAL-MEN.

3018 (3440, 3441). **Lien declared.**—Every mechanic, or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for, any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter, shall have a lien therefor on such building or improvement, and on the land on which the same is situated, to the extent, in ownership, of all the right, title and interest owned therein by such owner or proprietor, and, in area, of the entire lot or parcel of land, if in a city, town, or village, or, if not in a city, town, or village, of one acre; but the lien of employes of the contractor and persons furnishing materials to him shall extend only to the amount of

any unpaid balance due the contractor by the owner or proprietor; and such employes and material-men shall also have a lien on such unpaid balance.

Welch v. Porter, 63 Ala. 225; Geiger v. Hussey, Ib. 338; Ex parte Schmidt, 62 Ala. 252; Davis v. Betz, 66 Ala. 206; Copeland v. Kehoe, 67 Ala. 594; Porter v. Miles, Ib. 130; Willingham v. Long, 70 Ala. 587; Rothe v. Bellingrath, 71 Ala. 55; Young v. Stoutz, 74 Ala. 577; Pensacola R. R. Co. v. Schaffer, 76 Ala. 233; Montgomery Works v. Dorman, 78 Ala. 218; Trammell v. Hudmon, Ib. 222; Turner v. Robbins, Ib. 592; Childress v. Greenville, 69 Ala. 103; Chandler v. Hanna, 73 Ala. 390.

3019 (3442). **Priority of lien.**—Such lien, as to the land, shall have priority over all other liens, mortages, or incumbrances created subsequently to the commencement of the work on the building or improvement, or repairs thereto; and, as to the building or improvement, it shall have priority over all other liens, mortgages, or incumbrances, whether existing at the time of the commencement of such work, or subsequently created; and the person entitled to such lien may, when there is a prior lien, mortgage, or incumbrance on the land, have it enforced by a sale of the building or improvement under the provisions of this chapter, and the purchaser may, within a reasonable time thereafter, remove the same.

3020 (3443). **When building is on leased land.**—When the building or improvement is erected under or by virtue of any contract with a lessee in possession, and the erection thereof is not in violation of the terms or conditions of the lease, the lien shall attach to such building or improvement, and to the unexpired term of the lease, and the holder of the lien shall have the right to avoid a forfeiture of the lease by paying rent to the lessor, as it becomes due and payable, or by the performance of any other act or duty to which the lessee may be bound; and if the lien is enforced by a sale of the building or improvement, the purchaser may, at his election, become entitled to the possession of the demised premises, and to remain therein for the unexpired term, by paying rent to the lessor, or performing any other act or duty to which the lessee was bound, as if he were the assignee of the lease; or he may, within sixty days after the sale, remove such building or improvement from the premises; and if he elects to take possession and to remain therein until the expiration of the term of the lease, he may, within a reasonable time after the expiration of the term, remove such building or improvement from the premises. If, before a sale, the holder of the lien has made any payments of rent, or other pecuniary compensation to the lessor, which ought to have been paid by the lessee, he shall be reimbursed such payments from the proceeds of sale.

Rothe v. Billingrath, 71 Ala. 55.

3021. Right of lessor to discharge lien or prevent removal of building.—When a lien attaches under the preceding section, the lessor, at any time before a sale of the property, shall have the right to discharge the same, by paying to the holder the amount secured thereby, including costs and all moneys he may have paid to the lessor to prevent a forfeiture of the lease; and after a sale, he shall have the right to prevent the removal of the building or improvement from the premises, by paying to the purchaser the value of such building or improvement; and

upon such payment, either to the holder of the lien or to the purchaser, such building or improvement shall become the property of the lessor.

3022 (3444). **Verified statement to be filed with judge of probate; filing and contents of statement.**—It shall be the duty of every original contractor, within six months, and of every journeyman and day laborer, within thirty days, and of every other person entitled to such lien, within four months, after the indebtedness has accrued, to file in the office of the judge of probate of the county in which the property upon which the lien is sought to be established, is situated, a statement in writing, verified by the oath of the claimant, or some other person having knowlege of the facts, containing a just and true account of the demand secured by the lien, after all just credits have been given, a description of the property on which the lien is claimed, and the name of the owner or proprietor thereof, if known; but no error in amount or name of the owner or proprietor shall affect the lien; and unless such statement is so filed, the lien shall be lost.

Welch v. Porter, 63 Ala 225; Chandler v. Hanna, 73 Ala. 390; Montgomery Works v. Dorman, 78 Ala. 218; Turner v. Robbins, Ib. 592.

3023. By what officers oath administered out of state. If the oath to such statement is made beyond this state, it may be administered by any officer authorized to take acknowledgments and proofs of conveyances beyond this state.

3024 (3445). **Record of statement and fee therefor.**—The judge of probate shall indorse on such statement the date of its filing, and shall record the same in a book kept for that purpose, which shall be properly labled and indexed, and note therein the date of the filing; for all which he shall receive one dollar, which shall be secured to the party filing the statement by such lien.

3025. Selection of land, when tract exceeds one acre. When the land on which the building or improvement is situated is not in a city, town, or village, and exceeds in area one acre, the original contractor, or, if he dies, is absent from the state, or, for any cause, refuses or fails, on demand, to do so, any other party entitled to the lien, may, at any time prior to filing his statement in the office of the judge of probate; select the one acre which shall be subject to the lien; such selection to include the site of such building or improvement, and the land contiguous thereto, and to constitute but one lot or parcel.

3026 (3457). **When lien claimed by other than contractor; notice given to owner; unpaid balance subject.**—Every person, except the original contractor, who may wish to avail himself of the provisions of this chapter, shall, before filing his statement in the office of the judge of probate, give ten days' notice in writing to the owner or proprietor, or his agent, that he claims a lien on such building or improvement, setting forth the amount thereof, for what and from whom it is owing; and after such notice, any unpaid balance in the hands of the owner or proprietor shall be held subject to such lien when perfected and established.

Se bs v. Eng lhardt, 78 Ala. 508.

3027 (3458). **List of employes, etc., furnished owner; effect of failure.**—The original contractor shall, when so required, furnish to the owner or proprietor a complete list of all the material-men, laborers and employes, who have furnished any material or thing, or have done any labor, or performed any service, or who may be under any contract or engagement to furnish any material or thing, or to do any labor, or perform any service, for such contractor for or on such building or improvement, with the terms and price thereof; and if he fails or refuses to furnish such list, or to give such information, or if he shall fail to pay any material-man, subcontractor, laborer, or employe in accordance with any special contract made with the owner or proprietor, he shall thereby forfeit his right to a lien under this chapter.

3028. Jurisdiction for enforcement of lien.—When the amount involved exceeds fifty dollars, actions for the enforcement of liens under this chapter shall be brought in the circuit court, or court having like jurisdiction, of the county in which the property is situated; in all other cases, such actions shall be brought before justices of the peace.

3029 (3446). **How suits brought; pleadings and practice.** Such actions, when brought in the circuit court, or court of like jurisdiction, shall be commenced by summons and complaint, and when brought before justices of the peace, by summons. The complaint, or, when brought before justices of the peace, the statement indorsed on the summons, shall contain a description of the property on which the lien is claimed, and shall allege the facts necessary to entitle the plaintiff to the lien, and the enforcement thereof; in all other respects, the pleadings, practice and proceedings shall be the same as in ordinary civil actions at law.

Chandler v. Hanna, 73 Ala. 390.

3030 (3447). **Parties to such actions.**—In such actions, all persons interested in the matter in controversy, or in the property charged with the lien, may be made parties; but such as are not made parties shall not be bound by the judgment or proceedings therein.

Young v. Stoutz, 74 Ala. 574; Pensacola R. R. Co. v. Schaffer, 76 Ala. 233; Trammell v. Hudmon, 78 Ala. 222.

3031 (3448). **Revivor in case of death.**—On the death of any party to such suit, his personal representative shall be made a party thereto, plaintiff or defendant, as the case may be, and it shall not be necessary to make his heirs or devisees parties; but if he has no personal representative, and it is not desired to have one appointed, his heirs or devisees may be made parties.

3032 (3448). **Service on, and guardian ad litem for infants and lunatics; effect of judgment.**—When infants or persons non compos mentis are made parties defendant in such suit, the court must appoint a guardian ad litem to represent them and to protect their interests therein; and the judgment and proceedings in any such suit shall be as binding on them as on adults or persons of sound mind. If the infants are fourteen years of age, or over, service shall be made on them personally; if under the age of fourteen years, it shall be made for them on the person having the charge or custody of them.

3033. Service by publication.—When any defendant is absent from, or a non-resident of the state, or secretes himself so that service of process cannot be had upon him, upon affidavit being made of such fact, publication shall be made as to such defendant, as in cases commenced by attachment.

3034. Issues, verdict and judgment.—Any defendant, by appropriate plea, may put in issue the fact of indebtedness, or the existence of the lien, or both, and may interpose any other defense applicable to the suit; and if the court by its finding, or the jury by their verdict, as the case may be, ascertain that the plaintiff has a lien as claimed, judgment shall be rendered for the amount secured thereby, interest and costs, against the party liable for the same, and establishing the lien, and condemning the property to sale for the satisfaction thereof; but if the finding or verdict is for the plaintiff only on the issue of indebtedness, a judgment shall be rendered in his favor for the amount thereof as in other cases.

3035 (3450). **Judgment by default.**—Judgment by default may be rendered against any defendant, except infants and persons non compos mentis, who, after service has been perfected on him, fails to appear within the time required by law in other cases.

3036 (3453). **Enforcement of judgments.**—Judgments establishing the lien, and ordering the property sold for the satisfaction thereof, may be enforced by writs of fieri facias or venditioni exponas; but if by fieri facias, the clerk shall indorse thereon the fact, that the lien has been established, and a description of the property.

3037. Enforcement of judgments when rendered by justices of the peace.—Upon the rendition of such judgment by a justice of the peace, he shall transmit all the papers and a certified transcript of the judgment to the clerk of the circuit court, or court of like jurisdiction; and thereupon such clerk shall enter the cause on the execution docket, record the judgment, and issue a writ of fieri facias or venditioni exponas, as on judgments rendered in that court.

3038 (3459). **Suits by employes, etc.; contractor necessary party; garnishment against owner.**—If the suit is by an employe of the contractor, or by any person who has furnished to him materials for the building or improvement, the contractor shall be a necessary party defendant thereto; and in such suit, on motion of the plaintiff, the owner or proprietor may be cited to answer under oath how much was owing by him to the contractor, at the time of the service on him of the notice required by section 3026 (3457), on his contract with such contractor; and such answer may be controverted, and proceedings had, and judgment rendered as in garnishment cases.

3039 (3459). **When contractor must defend suit, and owner entitled to withhold or recover money from contractor.**—When the lien is sought to be enforced by any person other than the contractor, it shall be the duty of the contractor to defend the suit at his own expense; and after notice of an intention to file a statement of the lien, and pending the suit, the owner or proprietor may withhold from the contractor money sufficient to cover the amount claimed, and the probable cost and expense of suit; and in case of recovery against the

owner or proprietor, or his property, he shall be entitled to deduct from the amount owing by him to the contractor the amount of such judgment, cost and expense; and if he shall have settled with the contractor, he shall be entitled to recover from the contractor the amount recovered of, and paid by him; and such recovery may be had in the same court, on motion, on three days' notice.

3040 (3461). **Liens of employes, etc., on equal footing.** All liens arising under this chapter, except in favor of the original contractor, shall stand on an equal footing, and be first paid out of the proceeds of the sale of the property, or money collected from the owner or proprietor; and if such proceeds and money are insufficient to satisfy such liens in full, the same shall be distributed pro rata among the holders thereof; but no person shall be entitled to participate in such distribution until he has obtained judgment establishing his lien.

3041 (3454). **Limitation.**—Except in cases hereinafter provided, all liens arising under this chapter shall be deemed lost, unless suit for the enforcement thereof is commenced within six months after the maturity of the entire indebtedness secured thereby.

Seibs v. Engelhardt, 78 Ala. 508.

3042. Additional time to representative for filing statement and bringing suit.—If any person entitled to a lien under this chapter shall die before the time has elapsed for filing his statement in the office of the judge of probate, without filing it, his personal representative may file the same within three months after the grant of letters; and if such person shall die before commencing suit for the enforcement of his lien, and the lien is not lost at the time of his death, his personal representative may bring suit for the enforcement thereof at any time within six months after the grant of letters.

3043. Suits against representative within six months after grant of letters.—The provisions of this Code, prohibiting the bringing of suits against personal representatives within six months after the grant of letters, shall not apply to suits brought under the provisions of this chapter.

3044 (3455). **Satisfaction acknowledged of record.**—Whenever any such lien has been fully satisfied, the holder thereof must acknowledge satisfaction of the same on the margin of its record in the office of the judge of probate.

3045 (3456). **Penalty for failure to enter satisfaction.**—Any holder of such lien who, after having been fully paid, fails for ten days after demand to so acknowledge satisfaction thereof, shall be liable to any person thereby injured to the amount of such injury.

3046 (3460). **"Owner or proprietor" defined.**—Every person, including married women and cestuis que trust, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words "owner or proprietor," as used in this chapter.

Ex parte Schmidt, 62 Ala. 252; Schmidt v. Joseph, 65 Ala. 475; Copeland v. Kehoe, 67 Ala. 599.

3047. Lien may be assigned.—Any claim for which a lien is provided in this chapter may be assigned; and the assignee

shall be thereby invested with all the rights of the original holder of the lien, and be entitled to all his remedies to enforce them.

3048. When lien may be enforced in equity.—Any lien provided for under the provisions of this chapter, when the amount claimed is not less than one hundred dollars, may also be enforced by bill in equity, without alleging or proving any special ground of equitable jurisdiction.

CHAPTER 4.

LIENS IN FAVOR OF BLACKSMITHS AND WOOD-WORKMEN.

3049 (3462). **Lien declared.**—Any blacksmith, wood-workmen, or other mechanic, who contributes his labor and material, or either, to the production, manufacture, or repair of any vehicle, implement, machine, or article of any kind, shall have a lien thereon in the hands of a party for whom such vehicle, implement, machine, or article was made or repaired, or to whom sold, and in the hands of a purchaser with notice of such lien, for the value of the labor and material, or either, contributed to the production, manufacture, or repair of the same. As amended, Jan. 22, 1885, p. 92, sec. 1.

3050 (3464). **Attachment to enforce lien; bond and affidavit.**—Any party entitled thereto may enforce such lien in any court of law, of competent jurisdiction, by attachment, issued by any officer authorized to issue such writs, upon executing bond as in other cases of attachment, and upon making affidavit that the attachment is not sued out for the purpose of vexing or harassing the defendant, and describing the property on which the lien is claimed, and setting forth all facts necessary to the creation of the lien under the preceding section, and the amount due, and that one of the following causes of attachment exists: Ib. sec. 2.

1. That the party for whom such vehicle, implement, machine, or article was made or repaired, or to whom sold, is the owner thereof, and that the price, if agreed on, or if not, the value of the same, or of the repair thereof, or some part of either, is due and unpaid.

2. That the party for whom such vehicle, implement, machine, or article was made or repaired, or to whom sold, has transferred or sold the same to a purchaser with notice of the lien, and that the price, if agreed on, if not, the value of the same, or of the repair thereof, or some part of either, is due and unpaid.

3051 (3463). **Joinder of parties having liens on same property; verdict, judgment and distribution.**—Parties having liens under the provisions of this chapter, on the same property, may join in the same action for the enforcement of their respective liens; and when there is such joinder, the court or jury trying the cause must ascertain the amount due to each of the plaintiffs secured by the lien, and judgment must be rendered accordingly; but the failure of one or more of the plaintiffs to establish his or their liens shall not defeat a recovery by the others. The proceeds of the sale of the property levied on,

if not sufficient to satisfy the demands of all the plaintiffs, shall be distributed, after payment of the costs, pro rata among them.

3052 (3463). **Proceedings when one or more fail to join in action.**—When parties, having such liens on the same property, refuse, after notice in writing, to join in such action, the parties giving the notice may proceed without them, on making affidavit of the fact of such notice and refusal; and notice of the levy of the attachment must be served on the parties refusing to join, in the manner and within the time required for the service of such notice on the defendant; and such parties, either at the trial, or at any time prior thereto, on making affidavit setting forth all facts necessary to the creation of their liens, and the amounts thereof, may be made plaintiffs in the action, and the cause shall then proceed as if commenced jointly by them with the original plaintiffs; but on their failure to thus join, the cause shall proceed for the benefit of the original plaintiffs, who shall, in that event, be entitled to priority of satisfaction.

3053 (3464). **Limitation.**—Proceedings for the enforcement of any lien created by the provisions of this chapter must be commenced within six months after the demand becomes due; and unless commenced within that time, the lien is lost.

CHAPTER 5.

LIENS ON SHIPS, STEAMBOATS AND OTHER WATER-CRAFT.

3054 (3465). **Lien declared.**—A lien is hereby created on any ship, steamboat, or other water-craft, whether registered, enrolled, or licensed, or not, that may be built, repaired, fitted, furnished, supplied, or victualed, within this state, for work done, or materials supplied by any person within this state, in or about the building, repairing, fitting, furnishing, supplying, or victualing such ship, steamboat, or other water-craft, and for the wages of the masters, laborers, stevedores and ship-keepers of such ship, steamboat, or other water-craft, in preference to other liens thereon for debts contracted by, or owing from the owners thereof; and such lien may be asserted in any court of competent jurisdiction.

McClure v. Dellett, 38 Ala. 336.

3055 (3466). **Limitation.**—Proceedings to enforce such lien must be commenced within six months after the demand becomes due; and unless commenced within that time, the lien is lost.

CHAPTER 6.

LIENS IN FAVOR OF LANDLORDS.

ARTICLE 1.—For rent of farm-lands and advances.
2.—For rent of store-houses and other buildings.

ARTICLE I.

FOR RENT OF FARM-LANDS AND ADVANCES

As amended, Feb. 12, 1879, p. 72.

3056 (3467). **Lien declared.**—A landlord has a lien, which is paramount to, and has a preference over all other liens, on the crop grown on rented lands for rent for the current year, and for advances made in money, or other thing of value, either by him directly, or by another at his instance or request, or for which he became legally bound or liable at or before the time such advances were made, for the sustenance or well-being of the tenant or his family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market; and also on all articles advanced, and on all property purchased with money advanced, or obtained by barter in exchange for articles advanced, for the aggregate price or value of such articles and property.

Nature, priority and extent of lien.—McDonald v. Morrison, 50 Ala. 30; Folmar v. Copeland, 57 Ala. 488; Dryer v. Abercrombie, Ib. 497; Starnes v. Allen, 58 Ala. 316; Collins v. Whigham, Ib. 438; Nelson v. Webb, 54 Ala. 436; Scaiffe v. Stovall, 67 Ala. 236; Wilson v. Stewart, 69 Ala. 302; Corbitt v. Reynolds, 68 Ala. 378; Kennon v. Wright, 70 Ala. 434; Lomax v. LeGrand, 60 Ala. 537; Smith v. Bryant, Ib. 235; Ellis v. Martin, Ib. 394; Westmoreland v. Foster, Ib. 448. **Lien for advances.**—Cockburn v. Watkins, 76 Ala. 486; Bell v. Hurst, 75 Ala. 44; Lake v. Gaines, Ib. 144; Wilkinson v. Ketler, 59 Ala. 306; s. c., 69 Ala. 436; Holman v. Locke, 51 Ala. 287; Wills v. Thompson, 50 Ala. 83; Hamilton v. Maas, 77 Ala. 283; Thompson v. Powell, Ib. 391. **Waiver or postponement of lien.**—Tuttle v. Walker, 69 Ala. 172; Coleman v. Siler, 74 Ala. 435. **Remedies against purchasers with notice.**—Abraham v. Hall, 59 Ala. 386; Hussey v. Peebles, 53 Ala. 432; Lavender v. Hall, 60 Ala. 214; Lomax v. LeGrand, Ib. 537; Westmoreland v. Foster, Ib. 455; Boggs v. Price, 64 Ala. 514; Brown v. Hamil, 76 Ala. 506.

3057 (3468). **Maturity of rent and advances in absence of stipulation.**—Unless otherwise stipulated, such rent and advances shall become due and payable on the 25th day of December of the year in which the crop is grown.

3058 (3469). **Lien continues and attaches to crop of succeeding year.**—When the tenant fails to pay any part of such rent or advances, and continues his tenancy under the same landlord, on the same or other lands, the balance due therefor shall be held and treated as advances to him by the landlord for the next succeeding year, for which the original lien for advances, if any remain unpaid, shall continue on the articles advanced, or property purchased with money advanced, or obtained by barter in exchange for articles advanced, and for which a lien shall also attach to the crop of such succeeding year.

Gunter v. Dubose, 77 Ala. 326; Thompson v. Powell, Ib. 391.

3059 (3470). **Assignment; remedies of assignee.**—The claim of the landlord for rent and advances, or for either, may be by him assigned; and the assignee shall be invested with all

the landlord's rights, and entitled to all his remedies for their enforcement.

Westmoreland v. Foster, 60 Ala. 448; s. c., 52 Ala. 223; Corbitt v. Reynolds, 68 Ala. 378; Caffey v. Hunt, 75 Ala. 240; Drakford v. Turk Ib. 339.

3060 (3471). **Rent and advances; recovery of.**—Separate actions may be brought for rent and for advances, or both may be combined in the same action.

3061 (3472). **Lien enforced by attachment; grounds.**—The landlord, or his assignee, may have process of attachment for the enforcement of his lien for rent and advances, or either, when such rent and advances, or either, as the case may be, are due, and the tenant fails or refuses, after demand made, to pay the same; and also in the following cases, whether such rent and advances, or either, are due or not:

1. When there is good cause to believe that the tenant is about to remove from the premises, or otherwise dispose of any part of the crop, without paying such rent and advances, or either, and without the consent of the landlord, or, when the claim has been assigned, of the assignee.

2. When the tenant has removed from the premises, or otherwise disposed of any part of the crop, without paying such rent and advances, or either, and without the consent of the landlord, or, when the claim has been assigned, of the assignee.

3. When the tenant has disposed of, or there is good cause to believe that he is about to dispose of, any of the articles advanced or obtained by purchase with money advanced, or by barter in exchange for any article advanced, in fraud of the rights of the landlord, or of his assignee, as the case may be.

Masterson v. Bentley, 60 Ala. 520; Ellis v. Martin, Ib. 394; Campbell v. Hatchett, 55 Ala. 548; Fitzsimmons v. Howard, 69 Ala. 590; Busbin v. Ware, Ib. 279; Gunter v. Dubose, 77 Ala. 326; Thompson v. Powell, Ib. 391; De Bardeleben v. Crosby, 53 Ala. 363; Scaiffe v. Stovall, 67 Ala. 237; Shield v. Dothard, 59 Ala. 595; Dryer v. Abercrombie, 57 Ala. 497; Bell v. Allen, 76 Ala. 450; Cockburn v. Watkins, Ib. 486; Staggers v. Washington, 56 Ala. 225.

3062 (3473). **Affidavit and bond required.**—Before such attachment is issued, the plaintiff, or his agent, or attorney, must make affidavit, setting forth the amount that is or will be due for rent and advances, or either, as the case may be, or, if the rent is not payable in money, the value of the part of the crop, or other thing agreed to be paid as rent, that one of the causes for issuing an attachment prescribed in the preceding section exists, and that the attachment is not sued out for the purpose of vexing or harassing the defendant; and must also execute a bond in double the amount claimed, with sufficient surety, payable to the defendant, and with condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment.

See citations to preceding section.

3063 (3473). **Issue and trial of attachment; on what property leviable.**—Such attachment may be issued by any officer authorized to issue attachments in other cases, and made returnable before any court of competent jurisdiction, and must be tried in the same manner and upon the same notice as other attachment causes are tried, and may be levied on the crop, or the proceeds thereof, and on the articles advanced, and prop-

erty purchased with money advanced, or obtained by barter in exchange for articles advanced.

Ellis v. Martin, 60 Ala. 394; Agee v. Mayer, 71 Ala. 90; Robinson v. Lehman, 72 Ala. 402; Lehman v. Howze, 73 Ala. 302.

3064 (3474). **Relation between party furnishing land and party furnishing team and labor.**—When one party furnishes the land, and another party furnishes the labor and team to cultivate it, with stipulations, express or implied, to divide the crop between them in certain proportions, the relation of landlord and tenant, with all its incidents, and to all intents and purposes, shall be held to exist between them; and the portion of the crop to which the party furnishing the land is entitled shall be held and treated as the rent of the land.

Collier v. Faulk, 69 Ala. 58; Holcombe v. State, Ib. 218; McCall v. State, Ib. 227; Wilson v. Stewart, Ib. 302.

3065 (3475). **What a contract of hire; lien of laborer, and proceedings for its enforcement.**—When one party furnishes the land and the team to cultivate it, and another party furnishes the labor, with stipulations, express or implied, to divide the crop between them in certain proportions, the contract of hire shall be held to exist, and the laborer shall have a lien upon the crop produced by his labor for the value of the portion of the crop to which he is entitled; and such lien shall have the same force and effect, and shall be enforced in the same manner, and under the same conditions, and in the same cases as the lien in favor of a landlord; but no more of the crop shall be levied on than may be necessary to satisfy the demand.

See citations to preceding section.

3066 (3476). **When levied on crop of sub-tenant; vacation of levy.**—When lands are cultivated by a sub-tenant, and an attachment or other process is sued out by the superior landlord, or his assignee, for the purpose of enforcing his lien for rent and advances, or either, the crop of the tenant in chief must first be exhausted, before levy is made on the crop of the sub-tenant; but if the tenant in chief makes no crop, or if the crop made by him is not sufficient to satisfy the plaintiff's demand, then a sufficient amount of the crop of the sub-tenant may be levied on to supply the deficiency; and any levy made in violation of this section may be vacated on motion, at the first term of the court thereafter.

Agee v. Mayer, 71 Ala. 88; Robinson v. Ledyard, 72 Ala. 401; Lehman v. Howze, 73 Ala. 302.

3067 (3477). **When sub-tenant may require attachment against tenant in chief; effect of failure to attach.**—The sub-tenant may notify the superior landlord, or his assignee, of the existence of any one of the several causes authorizing the issue of an attachment against the crop of the tenant in chief, and if such notice is given, and an affidavit is made by the sub-tenant before an officer authorized by law to administer oaths, setting forth the existence of any one of such causes, and is served by the sub-tenant, in person, or by his agent, on such landlord, or his assignee, at the time the notice is given, and the landlord, or his assignee, fails or refuses to proceed within a reasonable time thereafter against the crop of the tenant in chief, he thereby

loses his right to proceed against the crop of the sub-tenant for any deficiency in the crop of the tenant in chief to satisfy his claim, in so far as that deficiency resulted from such failure or refusal to proceed.

See citations to preceding section.

3068 (3478). **Chapter applies to tenant in chief and sub-tenant.**—The provisions of this chapter shall apply to parties occupying the relation of tenant in chief and sub-tenant.

ARTICLE II.

FOR RENT OF STORE-HOUSES AND OTHER BUILDINGS.

Feb. 23, 1883, p. 175, sec. 1; as amended, Feb. 17, 1885, p. 131.

3069. Lien declared.—The landlord of any store-house, dwelling-house, or other building, shall have a lien on the goods, furniture and effects belonging to the tenant, for his rent, which shall be superior to all other liens, except those for taxes.

Feb. 23, 1883, p. 175, sec. 2.

3070. Lien enforced by attachment; grounds.—The landlord shall have the right, for the enforcement of such lien, to sue out an attachment before any officer authorized to issue attachments, and returnable to any court having jurisdiction of the amount claimed, when the rent, or any installment thereof, is due, and the tenant fails or refuses, on demand, to pay such rent or installment; and also in the following cases, whether due or not:

1. When the tenant has fraudulently disposed of his goods, or is about to fraudulently dispose of his goods.
2. When the tenant has made an assignment for the benefit of his creditors.
3. When the tenant has made a complete transfer of all, or substantially all of his goods, without the consent of the landlord, or without first having paid the rent in full for the term.

Ib. secs. 2, 3.

3071. Affidavit and bond for attachment.—Before such attachment is issued, the plaintiff, or his agent or attorney, must make affidavit, setting forth the amount that is, or will be due for the rent, that one of the causes for issuing an attachment prescribed in the preceding section exists, and that the attachment is not sued out for the purpose of vexing or harassing the defendant; and must also execute a bond in double the amount claimed, payable to the defendant, with sufficient surety, and with condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment.

Ib secs. 2, 5.

3072. On what property leviable; priority of lien.—Such attachment may be levied on so much of the goods, furniture and effects of the tenant as will satisfy the plaintiff's demand for rent; and such levy shall have priority over the levy of any other attachment on such goods, furniture and effects, in favor of any other creditor.

Ib. sec. 4.

3073. By what law attachment proceedings governed. The law governing the issue, levy, trial and other proceedings in attachment suits in general, not inconsistent with the provisions of this article, shall govern in all cases arising under this article.

Ib. sec. 6.

3074. Lien and remedy vest in assignee.—The lien pro-

vided in this article shall vest in any assignee of the claim for rent; and such assignee shall be invested with all the rights of the landlord, and entitled to all his remedies for their enforcement.

CHAPTER 7.

LIEN OF TENANT IN COMMON ON CROP.

3075 (3479). **Lien of tenant in common on crop of co-tenant.**—Persons farming on shares, or raising crops by joint contributions, in such manner as to make them tenants in common in such crops, or their assignees, shall each have a lien upon the interest of the other in such crops for any balance due for provisions, supplies, teams, materials, labor, services and money, or either, furnished to aid in cultivating and gathering such crops, under contract, or furnished when the interest of such crops require it, in case of a failure of either to contribute the amount and means as agreed upon by the parties.

3076 (3480). **Lien enforceable by attachment; grounds; remedy accumulative.**—Such lien may be enforced by attachment upon the grounds, and in the manner provided for the enforcement of the landlord's lien on crops grown on rented lands; but this section shall not prevent the enforcement of such lien by any other remedy.

CHAPTER 8.

LIENS IN FAVOR OF AGRICULTURAL SUPERINTENDENTS AND LABORERS, AND RAILROAD EMPLOYES.

3077 (3481). **Lien in favor of railroad laborers and employes.**—Laborers and employes of each railroad company operated in this state, except the officers thereof, shall have a lien for all debts due to them for work and labor done and performed by them for such company, which shall extend to, and cover all the property, rights, effects and credits of every description belonging to such company, and situate in this state.

3078 (3482). **Lien in favor of agricultural laborers and superintendents.**—Agricultural laborers and superintendents of plantations shall have a lien upon the crops grown during the current year, in and about which they are employed, for the hire and wages due them for labor and services rendered by them in and about the cultivation of such crops under any contract for such labor and services; but such lien shall be subordinate to the landlord's lien for rent and advances, and to any other lien for supplies furnished to make the crops.

Johnston v. Hannah, 66 Ala. 127; Townsend v. Brooks, 76 Ala. 308; Watts v. Womack, 44 Ala. 605.

3079 (3484). **Limitation.**—The liens created by this chapter shall be held to have been waived or abandoned, unless pro-

ceedings to enforce the same are commenced within six months after the work shall have been completed.

3080 (3485). **Liens enforceable by attachment.**—For the enforcement of such liens, the party entitled may sue out attachments before any officer authorized to issue such writs, returnable before any court of competent jurisdiction; but before any attachment shall issue, the plaintiff, his agent, or attorney, must make affidavit of the amount due, that the same remains unpaid, and that the attachment is not sued out for the purpose of vexing or harassing the defendant, and must describe therein the property on which the lien is claimed.

3081 (3486). **When attachment issues whether debt due or not; additional affidavit.**—An agricultural laborer or superintendent of a plantation may sue out an attachment, whether his demand is due or not; but, in either event, he shall, in addition to the affidavit required in the preceding section, make affidavit that such demand is or will be due, as the case may be, and that the defendant, without the consent of, and contrary to his agreement with the plaintiff, is about to remove the crop from the premises without paying such demand, or that the defendant has so removed such crop, or some portion thereof.

3082 (3487). **Bond required before issue of attachment.** Before any attachment shall be issued under the provisions of this chapter, the plaintiff, his agent, or attorney, must also execute a bond in double the amount claimed, payable to the defendant, with sufficient surety, to be approved by the officer issuing the attachment, with condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment.

3083 (3483). **Attachment to be levied only on crop sufficient to pay demand.**—When an attachment is sued out by an agricultural laborer or a superintendent of a plantation, it shall not be levied on a greater portion of the crop than is sufficient to satisfy the plaintiff's demand and the costs of the suit.

3084 (3488). **Time and manner of trial, and notice.**—Cases arising under this chapter shall stand for trial at the time, and shall be tried in the manner, and upon the notice required in other attachment cases.

3085 (3490). **Property or proceeds subject to garnishment.** All the property upon which a lien is created under the provisions of this chapter, or the proceeds thereof, in the hands of third parties, shall be subject to garnishment for the enforcement and satisfaction of such lien; and such garnishment, and the proceedings thereunder, shall be governed by the laws of force relating to other garnishments, so far as the same are applicable.

3086 (3491). **Other remedies not affected.**—Nothing in this chapter contained shall be so construed as to prevent any person having a lien thereunder from resorting to any other remedies, legal or equitable, which he may have for the enforcement of his lien, or the collection of his demand.

3087 (3492). **When crop not to be removed.**—No part of any crop levied on under the provisions of this chapter shall be removed from the premises on which it was raised, until all

claims for rent and advances for the current year have been satisfied.

3088 (3493). **When prior liens must be satisfied.** — Any officer, enforcing the satisfaction of any lien under the provisions of this chapter, shall first apply the proceeds of the crop or property in his hands to the payment of any debt or claim of a third party which constitutes a prior lien upon such crop or property, if the priority of such lien has been established, and the claim ordered to be paid, by the court before which the cause is tried.

CHAPTER 9.

LIENS OF LIVERY-STABLE KEEPERS.

3089 (3494). **Lien on stock kept and fed for charges.**—Any keeper, owner, or proprietor of a livery-stable shall have a lien on all stock kept and fed by him, for the payment of his charges for keeping and feeding such stock, and he shall have the right to retain the stock, or so much thereof as may be necessary, for the payment of such charges.

3090 (3495). **Power of sale to satisfy lien, on ten days' notice after demand.**—If the charges, when due, are not paid within ten days from demand therefor, such keeper, owner, or proprietor is authorized, after giving thirty days' notice of the time and place of such sale, by advertisement in some newspaper published in the county in which the stable is located, once a week for three successive weeks, or, if there be no such paper, by posting the notice in three conspicuous places in the county, to sell the stock, for the payment of the charges, and expense of keeping the stock, and of the sale; and the balance, if any there be, he shall pay over to the owner.

CHAPTER 10.

LIENS IN FAVOR OF OWNERS OF STALLIONS, JACKS, RAMS, HE-GOATS AND BOARS.

3091 (3496). **Lien declared.**—The owner of every stallion, jack, bull, ram, he-goat, or boar, who keeps it for profit, and charges a price for the season thereof, shall have a lien, for the amount of the stipulated price therefor, on any mare, jenny, cow, ewe, she-goat, or sow, to which such stallion, jack, bull, ram, he-goat, or boar is put, and also on the colt, calf, lambs, kids, or pigs born next after such season. As amended, Feb. 23, 1883, p. 157, sec. 1.

3092. Attachment for enforcement of lien; grounds for. For the enforcement of such lien the owner of any such animal may have process of attachment from any court having jurisdiction of the amount claimed, leviable on the animal or animals upon which the lien exists,— Ib. secs. 2, 3.

1. When such claim is due, and the defendant, on demand, fails or refuses to pay.

2. Whether such sum is due or not, when the defendant has traded off, or otherwise disposed of, or there is good reason to believe he is about to trade off, or otherwise dispose of, or remove from the county, any of the animals on which the lien exists, without paying the stipulated price for such season.

Ib. sec. 3.

3093. Affidavit and bond required before issue of attachment.—Before such attachment shall issue, the plaintiff, his agent, or attorney, must make affidavit of the amount of such stipulated price, whether the same is, or is not due, and if not due, when the same will become due, that the attachment is not sued out for the purpose of vexing or harassing the defendant, and that some one of the enumerated causes for such attachment exists, and must describe therein the property on which the lien is claimed; and he must also execute bond as prescribed by section 3082 (3487).

3094. Time and manner of trial; notice.—Cases arising under this chapter shall stand for trial at the time, and shall be tried in the manner, and upon the notice required in other attachment cases.

CHAPTER 11.

SUMMARY JUDGMENTS.

ARTICLE 1.—General rules.
2.—Proceedings against sheriffs, coroners and other executive officers.
3.—In favor of sheriffs or coroners.
4.—Against clerks of the circuit court and registers in chancery.
5.—Against judges of probate, tax-collectors, tax-assessors, treasurers, and other persons receiving money for the county.
6.—Against defaulters of the public school money.
7.—Against attorneys at law.

ARTICLE I.

GENERAL RULES.

3095 (3351). **Summary judgments against certain officers; notice of motion.**—Judgment may be rendered summarily against the persons, and for the defaults hereinafter stated, upon notice in writing by the party aggrieved, that a motion will be made for judgment, succinctly stating in such notice the cause for which such motion will be made, and the term of the court, and the county.

Brown v. Wheeler, 3 Ala. 287; Branch Bank v. Broughton, 10 Ala. 147; Gary v. Edwards, 15 Ala. 105; Arthur v. State, 22 Ala. 61; Connoly v. A. & T. R. R. Co., 29 Ala. 373; Barclay v. Barclay, 42 Ala. 345; Palmer v. Fitts, 51 Ala. 489; Shouse v. Lawrence, Ib. 559; Daniels v. Hamilton, 52 Ala. 105; Warwick v. Brooks, 70 Ala. 412.

3096 (3352). **By and against whom motion may be made; judgment against parties served with notice.**—The motion may be made by the party aggrieved, or his legal representa-

tive, against the person in default and the sureties upon his official bond; and judgment must be rendered against such of the parties, whether principal or surety, as may have received notice of the intended motion.

Gary v. Bank, 11 Ala. 771; Armstrong v. Holly, 29 Ala. 305; Walker v. Chapman, 22 Ala. 117; Jones v. Brooks, 30 Ala. 588; Ware v. Green, 37 Ala. 494; Ex parte N. E. R. R. Co., Ib. 679; Daniels v. Hamilton, 52 Ala. 105; Marion County v. Brown, 43 Ala. 112; Ex parte Wilson, 54 Ala. 296.

3097 (3353). **Entry on motion docket as notice.**—A motion entered on the motion docket, in term time, is sufficient notice to all officers of the court and their sureties.

James v. Moseley, 47 Ala. 299.

3098 (3354). **Trial of motion.**—Unless in cases otherwise directed by this chapter, the court must hear and determine the motion, and render judgment upon the evidence, without a jury, unless an issue is tendered, and a jury trial demanded, when a jury must be immediately impaneled to try the facts, unless good cause be shown for a continuance.

Andrews v. Keep, 38 Ala. 315.

3099 (3355). **Court in which motion must be made.**—The summary remedies here given must be enforced in the manner following, except in cases otherwise specially provided in this chapter: When the motion is against a sheriff, coroner, clerk, or other officer of court, or their sureties, the motion must be made in the circuit court of the county in which such officer was acting officially at the time of the default, or in the court to which the process was returnable, when the default consists in the failure to execute or return process, or to pay over money collected thereon; and in all other cases not specially provided for, the motion must be made in the circuit court of the county in which the person moved against resides; or if he has no permanent residence, then in any county where he may be found.

Andrews v. Keep, 38 Ala. 315.

ARTICLE II.

PROCEEDINGS AGAINST SHERIFFS, CORONERS AND OTHER EXECUTIVE OFFICERS.

3100 (3356). **Against sheriff, coroner, or other officer receiving or executing writ; notice.**—Judgment must be rendered for the plaintiff, on three days' notice, in the following cases, against the sheriff, coroner, or other officer receiving or executing the writ.

Camp v. Watt, 14 Ala. 616; Thompson v. Acree, 69 Ala. 178.

3101 (3357). **For failure to return execution, or pay over money collected.**—For failing to return an execution, twenty per centum on the judgment. For failing to pay over money collected upon an execution, on demand of the plaintiff, his agent, or attorney, for the amount so collected, and five per centum per month damages from the time such demand was made.

For failing to return an execution.—Yancey v. Hawkins, Minor, 171; Hill v. State Bank, 5 Port. 537; Ayres v. Dobson, 5 Stew. & Port. 441; Bondurant v. Wood, 1 Ala. 543; Harris v. Bradford, 4 Ala. 214; Godbold v. P. & M. Bank, Ib. 516; Crawford v. Chandler, 5 Ala. 61; Armstrong v. Robertson, 2 Ala. 164; Caskey v. Nitcher, 8 Ala. 622; Allums v. Hawley, Ib. 584; Johnson v. McLaughlin, 9 Ala.

551; Samples v. Walker, Ib. 726; Shute v. McRae, Ib. 931; Branch Bank v. Broughton, 10 Ala. 147; Patterson v. Officers, 11 Ala. 740; Caskey v. Haviland, 13 Ala. 314; Gary v. Edwards, 15 Ala. 105; Noble v. Whetstone, 45 Ala. 361; Marcum v. Burgess, 67 Ala. 556. **For failing to pay over money collected.**—Barton v. Bank, 1 Stew. & Port. 471; Barton v. Lockhart, 2 Stew. & Port. 109; Broughton v. State Bank, 6 Port. 48; Jameson v. Harper, 1 Port. 431; Reid v. Bank, 3 Ala. 712; Brazeal v. Smith, 5 Ala. 206; Riley v. Marshall, Ib. 682; Farmers' Bank v. Reid, 3 Ala. 299; Price v. Cloud, 6 Ala. 248; Dumas v. Patterson, 9 Ala. 484; Hodges v. Laird, 10 Ala. 678; Evans v. State Bank, 13 Ala. 787; Fitzpatrick v. Branch Bank, 14 Ala. 533; McArthur v. Dane, 61 Ala. 539.

3102 (3358). **For failure to make money on execution.** For failing to make the money on an execution, which, by due diligence, could have been made, for the amount of the execution, interest, and ten per centum damages thereon.

Anderson v. Cunningham, Minor, 48; Kirkmans v. Harkins, 1 Port. 22; Bondurant v. Lane, 9 Port. 484; Leavitt v. Smith, 7 Ala. 175; Mason v. Watts, Ib. 703; Crenshaw v. Harrison, 8 Ala. 342; Leach v. Williams, 8 Ala. 759; Pharr v. Hale, 9 Ala. 312; McCall v. McRea, 10 Ala. 313; Easley v. Walker, Ib. 671; Anderson v. Bright, 12 Ala. 478; Whitsett v. Slater, 23 Ala. 626; Couch v. Atkinson, 32 Ala. 633; Harris v. Murfree, 54 Ala. 161; Wilson v. Stroback, 59 Ala. 488; Andrews v. Keep, 38 Ala. 315.

3103 (3359). **For false and fraudulent return.**—For fraudulently making a false return, for the amount of the execution, interest, and ten per centum damages thereon.

Tarleton v. Gibson, 2 Ala. 638; Bondurant v. Bank, 5 Ala. 171.

3104 (3360). **For failure to give notice of collection of money.**—For failing to notify the plaintiff, his agent, or attorney, of the collection of money by execution, for five per centum per month on the amount collected, from the time when the notice should have been given, not to exceed twenty-five dollars per month.

3105 (3361). **For failure to indorse on execution true date of delivery.**—For failing to indorse on an execution the true date of its delivery to him, for ten per centum on the amount of the execution; and the officer is also responsible for any injury or loss which may arise from such omission.

3106 (3362). **For failure to execute mesne process.**—For failure to execute a summons, attachment, or other mesne process, which by due diligence could have been executed, for a sum not less than fifty, nor more than five hundred dollars, to be ascertained by a jury; and this remedy shall not preclude the party injured from a resort to other legal modes of redress.

3107 (3363). **In favor of defendant in execution; notice; when rendered.**—Judgment must, in like manner, be rendered in favor of the defendant in execution against the sheriff or coroner, on three days' notice, in the following cases.

3108 (3364). **For failure to pay over excess received on sales.**—For failure to pay over on demand any excess of money which may remain upon a sale under execution, after the satisfaction thereof, and of the costs, for the amount of such excess, and five per centum per month after demand.

Baylor v. Scott, 2 Port. 315.

3109 (3365). **For failure to return execution satisfied.** For failing to return an execution wholly or partially satisfied, for twenty-five per centum on the amount paid.

3110 (3366). **For failure to refund money when collection has been enjoined.**—For failing to pay over on demand money paid or collected on an execution, the whole or any part of

which is enjoined in chancery, for the amount so enjoined, and five per centum per month on the amount from the time of the demand.

3111 (3367, 3368). **In favor of clerk of supreme court; notice and grounds.**—Judgment must, in like manner, be rendered in favor of the clerk of the supreme court against the sheriff or coroner, on three days' notice, for failure to return an execution from that court, for making a false return thereon, for failing to make the money thereon, when by due diligence it could have been made, or for failing on demand to pay over money collected on execution, for the penalties herein prescribed for the same defaults on executions issued from the circuit court.

3112 (3369). **Copy of execution and certificate of clerk as evidence.**—On the trial of the motion by such clerk, a copy of the execution made and certified by him, with the return thereon, if any was made; or a statement that no return was made, if such be the fact, together with his certificate that the execution was received by the sheriff, or sent to him by mail, is evidence of the facts so certified, without producing a transcript of the record from the proceedings of the supreme court; and also presumptive evidence that the writ was received by the sheriff, unless he states under oath, in writing, that he never received the writ, or that he returned it according to law.

3113 (3371). **Penalty for accepting substitute for juror; proceedings.**—Any officer who accepts or receives a substitute for any person drawn as a juror, or whom he is directed to summon as a juror, or who intentionally serves any other person than the one drawn as a juror, or whom he is directed to summon as a juror, must be fined fifty dollars, to be recovered on motion by the solicitor in the name of the state, in the circuit court of the county in which the offense is committed, on five days' notice; one-half of which shall be for the use of the county, and the other half for the use of the solicitor.

ARTICLE III.

IN FAVOR OF SHERIFF OR CORONER.

3114 (3374). **Against whom, for what, and on what notice.** Judgment must, in like manner, be summarily rendered in favor of the sheriff or coroner, on three days' notice of the pendency of the suit,—

1. Against the obligors on bonds given to indemnify such officer for levying an execution or attachment, or for making sale of property so levied on or attached, after judgment against him for making such levy or sale, for the amount rendered against such officer, with interest from date of judgment against him.

2. Against the deputy of the sheriff or coroner and his sureties, or either of them, for the amount of any judgment rendered against the sheriff or coroner for the default of such deputy, with interest from date of judgment against him.

Atwood v. Craig, 3 Stew. & Port. 21; Magee v. Toulmin, 5 Ala. 141; Stephens v. Womack, 3 Ala. 738.

3115 (3375). **Against judge of probate for failing to pay over fees to sheriff.**—Judgment must, in like manner, be summarily rendered in favor of the sheriff, on three days' notice, against the judge of probate, for the amount of any fees received by him for such sheriff for the service of citations, notices, or other process in relation to estates of deceased persons or minors, which, on demand, have not been paid over, with five per cent. per month from the time of such demand.

ARTICLE IV.

AGAINST CLERKS OF THE CIRCUIT COURT AND REGISTERS IN CHANCERY.

3116 (3376). **Grounds of judgment and notice.**—Judgment must, in like manner, be summarily rendered against the clerk of the circuit court and his sureties, or either of them, and against the register in chancery and his sureties, or either of them, on three days' notice, in the following cases.

Armstrong v. Holley, 29 Ala. 305.

3117 (3377). **For failure to enter return on execution.**—In favor of the plaintiff in execution, for failing to enter on the execution docket the return made upon an execution by the proper officer, within three days after the return is made, for twenty per centum on the amount of the execution, and interest thereon.

3118 (3378). **For failure to pay over money.**—For failing, on demand, to pay over money received by him on any judgment, or paid into court on a plea of tender, or other plea, or by rule of court, for the sum so received by him, with five per centum per month on the amount from the time of the demand.

3119 (3379). **For failure to give notice of collection of money.**—For failing to notify the plaintiff, his agent, or attorney, under the provisions of section 2912 (3203), which are made to apply to such clerk, of the collection of money upon judgments, for five per centum per month on the amount collected, from the time when the notice should have been given, not to exceed twenty-five dollars per month.

3120 (3380). **For failure to issue executions.**—For failing to issue execution as required by sections 2884 (3181) and 2887 (3184), within the time prescribed by law after the adjournment of the court, or at any time subsequent, on the request of the party interested, his agent, or attorney, or for failing to issue execution within five days on any bond returned forfeited, and upon which execution may rightfully issue, and upon any judgment remanded from the supreme court, for twenty per centum on the amount of the judgment.

3121 (3381). **For failure to pay over money deposited in court.**—In favor of the party entitled thereto, for failing, on demand, to pay over money received by him under section 2610 (2906, 2907), for the amount so paid, and five per centum damages thereon per month from the time of the demand.

3122 (3382). **For failure to pay over county funds.**—In favor of the county treasurer, for the use of the county, for failing to pay over to that officer, on demand, any fine, forfeiture, or other money belonging to the county treasury, for the

amount thereof, and five per centum per month on that amount from the time of the demand.

3123 (3383). **For failure to render statement of fines, etc.** For failing to render to that officer, within ten days after the adjournment of court, a statement of all fines assessed, forfeitures obtained and moneys received for the county, during the previous term, as required by subdivision 16 of section 768 (671), for fifty dollars.

3124 (3384). **In favor of auditor for specified defaults; court and notice.**—In favor of the state auditor, in the circuit court held at the seat of government, or of the county in which the clerk or any surety proceeded against resides, on ten days' notice, in the following cases.

3125 (3386). **For failure to issue execution for forfeiture.** For failing to issue execution for any forfeiture belonging to the state treasury within the time prescribed by section 2884 (3181), for two hundred dollars.

3126 (3387). **For failure to pay into state treasury fines, etc.**—For failure to pay into the state treasury any fine, penalty, or forfeiture belonging thereto, received by such clerk, within one month after it was received by him, for the amount so received, and ten per centum damages thereon.

3127 (3388). **For failure to send copy of indictment to governor; court and notice.**—In favor of the solicitor for the use of the state, on three days' notice, in the circuit court of the county of such clerk, for neglect of the duty imposed by section 772 (675), for not less than one hundred, nor more than five hundred dollars, at the discretion of the court.

3128 (3389). **For failure to send up transcript in criminal case; court and notice.**—The solicitor, or prosecuting attorney, in each county, upon being notified that the clerk of the circuit court has neglected to send to the clerk of the supreme court a full transcript of the record of any criminal case appealed to the supreme court, within the time required by law, shall enter a motion against such defaulting clerk and his sureties, in the court from which the appeal was taken, setting out the title of the case, the offense of which the accused was convicted, the day on which the sentence was pronounced, the day on which the court adjourned, and the default of the clerk; and such motion shall be heard at the next term of the court, and of it the clerk shall have at least ten days' notice.

3129 (3390). **Certificate of clerk of supreme court as evidence.**—The certificate of the clerk of the supreme court that the transcript of the record in such criminal case was not received by him in twenty-five days after the final adjournment of the court in which the case was tried, shall be prima facie evidence of the default of the clerk.

3130 (3391). **Fine against clerk and sureties for such neglect.**—On conviction for such neglect, a fine of not less than twenty-five dollars, at the discretion of the court, shall be entered against such defaulting clerk and his sureties for the use of the county.

3131 (3392). **Against registers for failure to keep reverse indexes; court, notice and judgment.**—The solicitors in the several chancery districts must inquire whether the duty required of registers in chancery by section 743 (646) has been per-

formed, and must, in every case of failure, move in the circuit court of the proper county against such register; and shall, upon three days' notice of such motion, recover judgment in favor of the state against him for one hundred dollars, unless good cause to the contrary be shown; and such recovery may be had from term to term as long as such register shall remain in default.

ARTICLE V.

AGAINST JUDGES OF PROBATE, TAX-COLLECTORS, TAX-ASSESSORS, COUNTY TREASURERS, AND OTHER PERSONS RECEIVING MONEY FOR COUNTIES.

3132 (3393). **Court, notice and grounds.**—Summary judgment must be rendered in favor of the state against the defaulters hereinafter named, and their sureties, or either, in any court of the county of their residence having jurisdiction, on ten days' notice, in the following cases:

1. Against any tax-assessor for failing to comply with the requirements of section 487 or section 491, for not more than five hundred dollars; and such tax-assessor may be also imprisoned in the county jail for not exceeding three months.

2. Against any tax-assessor for making up a false or fraudulent assessment, in each case, for not more than five hundred dollars; and such tax–assessor may also be imprisoned in the county jail for not exceeding three months.

3. Against any tax-assessor for any willful neglect or failure to perform the duty required of him in section 469, for not more than two hundred dollars.

4. Against any county treasurer for failing to pay over the excess of purchase-money, as provided in the revenue law, to the former owner of any property sold for taxes, for not less than two hundred dollars.

5. Against any judge of probate for failing to make out and forward abstracts, or reports, or returns, according to the requirements of the revenue law, for not more than five hundred dollars.

6. Against any judge of probate for issuing license to retail or wholesale liquor dealers contrary to the provisions of law, in each case, for not less than one hundred dollars.

7. Against any tax-collector for failing to comply with section 533, for not more than two hundred dollars.

8. Against any tax-collector for knowingly collecting more taxes from a tax-payer than authorized by law, or justified by the assessment, in each case, for not more than five hundred dollars.

9. Against any tax-collector for failing to make the statement provided by section 547 within the time required, for each week he so fails, for not more than five hundred dollars.

10. Against any tax-collector for not paying over surplus of sale of any property sold by him for the payment of taxes, as required by law, for not more than one hundred dollars.

11. Against any tax-collector for any violation of section 550, for not more than two hundred dollars.

Against defaulting tax-collectors.—Collier v. Powell, 23 Ala. 579; Ware v. Green, 37 Ala. 494; Marion County v. Brown, 43 Ala. 112; Ex parte Wilson, 54 Ala. 296; Timberlake v. Brewer, 59 Ala. 108.

3133 (3394). **When collector, assessor, or judge of probate, forfeits half pay; court and notice.**—Any tax-collector, tax-assessor, or judge of probate, who knowingly and willfully neglects to discharge any of his duties as required in the revenue law, shall forfeit one-half of his compensation under that law, for the use of the county, which may be recovered, on motion in the circuit court of the county, on ten days' notice; and it shall be the duty of the solicitor to make the motion; but any other person may make it.

3134 (3395). **Against county treasurer and sureties for failure to pay allowed claims; court and notice.**—If any county treasurer fail, on demand, and without good excuse, to pay an allowed claim against the county, when there are funds in the treasury to pay the same, judgment may be obtained against him and his sureties, or any or either of them, on five days' notice, on motion in the circuit court of the county, in the name of the party to whom the claim is payable, his legal representatives, or assigns, for the amount of the claim, with interest from the time of the demand, and ten per centum damages and costs.

Cohen v. Coleman, 71 Ala. 496; Boothe v. King, Ib. 497; Caldwell v. Dunklin, 65 Ala 461; Enloe v. Reike, 56 Ala. 500; Caldwell v. Guinn, 54 Ala. 64.

3135 (3396). **Judgments for failure to pay over moneys of the county; court and notice.**—If any tax-collector, judge of probate, sheriff, clerk, or other officer or person, fail to pay to the county treasurer, within the time prescribed by law, or, in case no time is fixed by law, on the demand of such treasurer, any money he has collected or received for the county, judgment may be recovered against such person, or such officer and his sureties, or any or either of them, on ten days' notice, on motion in the circuit court, in the name of the county of such treasurer, for the amount so collected or received, with interest from the time fixed for the payment, or from the demand when no time is fixed, and ten per centum damages and costs.

Dudley v. Chilton County, 66 Ala. 593.

ARTICLE VI.

AGAINST DEFAULTERS OF PUBLIC SCHOOL MONEYS.

3136 (3397). **For failures to pay over school moneys; court and notice.**—Summary judgments must be rendered on motion, after ten days' notice, in favor of the county superintendent of education, for the use of his county, against the defaulters hereinafter named, and the sureties on their official bonds, or any one or either of them, in the circuit court, or other court having jurisdiction, of the county in which the defendants, or either of them, reside, in the following cases:

As amended, Feb. 7, 1879, p. 117, sec. 76.

1. Against the tax-collector and his sureties, or any or either of them, for the failure of such collector to pay over, according to law, the school moneys due his county, as shown by the auditor's warrant on him, or so much thereof as he may have collected, or for the failure of such collector to pay over, according to law, all the poll-tax collected by him, which it was his duty to collect, and which by due diligence he could have collected, for the amount for which the collector is in default, with interest from

the time of the default, and twenty per centum damages and costs.

2. Against the county treasurer and his sureties, or any or either of them, for the failure of such treasurer to pay over according to law all school moneys coming into his hands, for the amount due by such treasurer, with interest from the time of the default, and twenty per centum damages and costs.

3. Against any county superintendent of education who has resigned, removed from his county, or been legally removed from office, or whose term of office has expired, and his sureties, or any or either of them, in favor of his successor, if there be one, or if there be no successor, in favor of the superintendent of education, for the amount of school moneys belonging to his county which have not been legally disbursed by him, or paid over to his successor in office, with interest from the time of the default, and twenty per centum damages and costs; and the money, when recovered by the superintendent of education, must be turned over to the county superintendent of education.

Ratliff v. Allgood, 72 Ala. 119.

Ib. p. 117, sec. 77.

3137 (3398). **Authority to employ counsel.**—The county superintendent of education may employ attorneys to prosecute actions under the provisions of this article against such defaulters and their sureties; but in no case shall any attorney receive more than [1] ten per centum of the amount which may be collected on any judgment obtained by him, or of the amount which may be otherwise recovered by him.

[1] March 1, 1881, p. 67, sec. 77.

Ib. sec. 78.

3138 (3399). **Notice.**—The notice of such motion may be served by any sheriff of this state, and must succinctly state the cause for which, and the court and term at which, the motion will be made.

Ib. sec. 79.

3139 (3400). **Transcript of superintendent of education evidence.**—On the trial of such motion, a transcript from the books and records in the office of the superintendent of education, or of the auditor, duly certified under his hand, shall be prima facie evidence of the facts shown by them.

Ib. sec. 80.

3140 (3401). **Time and manner of trial.**—If the notice has been given as herein required, such motion shall stand for trial at the first term, and the court must hear and determine the same, and render judgment upon the evidence without a jury, unless a trial by jury be demanded, when a jury must be immediately impaneled to try the issues of fact, unless good cause be shown for a continuance.

Ib. sec. 21.

3141. In favor of teachers for moneys due them; court and notice; appeal from justices' courts.—Summary judgment may also be rendered against the county superintendent of education and his sureties, or any or either of them, in favor of any teacher of the public schools, his legal representative, or assignee, by motion, on ten days' notice, in any court of the county of such superintendent, of competent jurisdiction, for failing to pay over, on demand, to such teacher any moneys in the hands of such superintendent due or owing to such teacher, as required by law, for the amount of such moneys, with interest from the time of the demand, and ten per centum damages on the aggregate amount, and costs; but from all cases tried

before a justice of the peace, or notary public, either party shall have the right to appeal, as provided by law in other cases tried before such officer.

ARTICLE VII.

AGAINST ATTORNEYS AT LAW.

3142 (3402, 3404). **For money collected and not paid over; proceedings.**—Judgment may, in like manner, be summarily rendered against any attorney at law in this state who fails to pay over money collected by him in that capacity, on demand made by the person entitled thereto, his agent, or attorney, for the amount due, interest thereon, and damages at the rate of five per centum per month, after such demand, on the aggregate amount, in the circuit court of the county in which such attorney resides, or if he has no known place of residence in this state, in the circuit court of any county, on three days' personal notice; but such attorney may, if a doubt exists as to the right of the person making the demand, or if there be a dispute as to his compensation, pay the money into court, at the first term after receiving notice of such motion, if the notice of the same is given in vacation, or at the term at which the notice is given, if given during term time, and have such questions there decided, without being liable for interest or damages.

3143 (3403). **Plaintiff's title to be shown; both parties may be examined; costs.**—The court may require the party claiming the money to establish his right thereto, and, in determining the question of compensation, may examine both parties and give costs in discretion.

CHAPTER 12.

PROCEEDINGS BY SURETIES.

3144 (3405). **Surety on replevy bond may demand indemnity.**—When the principal in any replevy bond is wasting the replevied property, or is removing, or is about to remove himself or property out of the state, the surety or sureties on the replevy bond may demand of the principal adequate indemnity against loss by collateral security.

3145 (3406). **Affidavit may be made of refusal to give indemnity.**—If such security is not given within five days after demand made, the surety may make affidavit thereof before the clerk of the court in which such bond is filed, setting forth the demand of the principal for collateral security, for some one or more of the causes mentioned in the preceding section, and that the principal has failed to give such security.

3146 (3407). **Writ of seizure may then issue.**—Thereupon the clerk must issue a writ directed to the sheriff, commanding him to seize the replevied property, and hold the same until the decision of the cause in which it was replevied, or until the principal executes bond with sufficient surety, in the same pen-

alty as the replevy bond, payable to the surety, with condition to have the property forthcoming to abide the decision in the principal cause, or to pay and satisfy the judgment rendered therein.

3147 (3408). **Bond, if given, filed with original bond.**—If the bond is given, it must be filed with the original replevy bond; and execution may issue thereon, upon a breach of the original replevy bond, in favor either of the plaintiff or of the surety.

3148 (3409). **Proceedings on writ of seizure, when property is perishable.**—If the bond is not given, and the property is seized, and is of a wasting or perishable nature, or the expense of keeping it would materially affect its value, it must be sold by the sheriff in the same manner as property levied on under execution, and return thereof made as upon a writ of fieri facias.

3149 (3410). **Judgments for sureties against their principals, and between each other; motion and notice.**—Sureties, whether bound on the contract or instrument with the principal debtor as joint, or joint and several obligors or promisors, or as accommodation drawers, acceptors, or indorsers of a bill of exchange, or in any other manner, are entitled to a summary judgment against their principal, and between each other, by motion in the circuit court, on three days' notice thereof, in the cases, and in the manner following.

Nation v. Roberts, 20 Ala. 544; Irwin v. Scruggs, 32 Ala. 516; Moody v. Findley, 43 Ala. 167.

3150 (3411). **For surety against principal debtor.**—Against the principal debtor,—

1. When a judgment has been obtained against the surety, which he has satisfied, either wholly or in part, for the amount paid and interest.

2. When a surety or sureties are sued without their principal, upon notice given to the principal of the pending suit, if judgment is obtained against the surety, judgment for the same amount must be rendered against the principal in favor of the surety.

Dubberly v. Black, 38 Ala. 193; Riley v. Stallworth, 56 Ala. 481.

3151 (3412). **Judgments between sureties.**—Between sureties,—

1. A surety who has paid the debt of his principal may recover of each of his co-sureties their aliquot proportion of the debt; and if any of the co-sureties are insolvent, the proportion of such insolvent must be excluded from the estimate, and judgment be rendered against the remaining solvent sureties for their proportion of the debt, as if such insolvent was not a co-surety.

2. When suit is pending against one or more sureties, either in connection with, or without their principal, if the principal is insolvent or dead, the surety so sued may, on notice of the pending suit, recover judgment against such of the co-sureties as are not sued in that action for their aliquot proportion of the debt, excluding from the estimate the proportion of such of the

sureties as are insolvent, as if such insolvent had not been a surety.

Roberts v. Adams, 6 Port. 361; White v. Banks, 21 Ala. 705; Broughton v. Robinson, 11 Ala. 922; Waller v. Campbell, 25 Ala. 544; Rutherford v. Smith, 27 Ala 417; Irwin v. Scruggs, 32 Ala. 516; Simmons v. Varnum, 36 Ala. 92; Jemison v. Governor, 47 Ala. 390; Broughton v. Wimberly, 65 Ala. 549.

3152 (3413). **When surety not to confess judgment.**—No surety, when sued, can confess judgment, or suffer judgment to pass by default, if the principal debtor, on being notified of the pending suit, is willing to defend the suit at his own cost, and gives good and sufficient collateral security to the surety, to be approved by the court.

Riley v. Stallworth, 56 Ala. 481.

3153 (3414). **Surety may require creditor to sue principal or other sureties; discharged on failure.**—A surety upon any contract for the payment of money, or for the payment or delivery of personal property, may require the creditor, or any one having the beneficial interest in the contract, by notice in writing, to bring suit thereon against the principal debtor, or against any co-surety to such contract; and if suit is not brought thereon, pursuant to such notice, to the first court to which suit can be brought after the receipt of such notice, and prosecuted with diligence according to the ordinary course of law, the surety giving such notice is discharged from all liability as surety, or his aliquot proportion of the debt, as the case may be; and one surety may give the notice in behalf of his co-sureties.

Shehan v Hampton, 8 Ala. 942; Pickens v. Yarbrough, 26 Ala. 417; Savage v. Carleton, 33 Ala. 443.

3154 (3415). **To what not applicable.**—The remedy secured by the preceding section does not apply to bonds or other contracts with collateral conditions, or to the bonds of executors, administrators, guardians, or public officers.

3155 (3416). **In whose favor and against whom provisions inure.**—All the provisions of this chapter inure to the benefit of the personal representatives of the creditor or surety, and in favor of sureties and co-sureties against the personal representatives of the principal, or of a surety.

Barclay v. Barclay, 42 Ala. 345.

3156 (3417). **Court in which motion should be made.**—In cases not otherwise provided for in this chapter, the motions must be made in the circuit court of the county in which the parties, or any of them, against whom the motion is made, reside, or if they are non-residents, or have no fixed residence in the state, then in the circuit court of any county in the state.

Dubberly v. Black, 38 Ala. 193.

3157 (3418). **On payment by surety, judgment must be assigned to him.**—Whenever a judgment is obtained by a creditor on a demand to which there are one or more sureties, the sureties may pay such demand, and the plantiff in the judgment, his agent, or attorney of record, when the payment is made, must assign such judgment to the surety or sureties paying the money, who may collect the same, with interest and costs, in the name of the plaintiff for their use, and may assert, in law or equity, any lien or right against the principal debtor, which the plaintiff could have asserted if the debt had not been

paid; but in every such case, the assignee of the judgment is bound to accept and receive payment of it in the same kind of currency which he may have paid for it.

Winslow v. Bracken, 57 Ala. 368; Giddens v. Williamson, 65 Ala. 439; Vandiveer v. Ware, Ib. 606; Watts v. Eufaula Nat. Bank, 76 Ala. 474.

CHAPTER 13.

MANDAMUS, PROHIBITION, CERTIORARI AND OTHER REMEDIAL WRITS OF A SUPERVISORY NATURE.

Feb. 12, 1879, p. 150, sec. 1.

3158. Application for; pleadings and right of amendment. All applications for mandamus, prohibition, certiorari, or other remedial writ of a supervisory nature, shall be commenced by a petition verified by affidavit, in which the facts shall be stated as briefly and succinctly as the case will admit of; and any defendant may demur, plead, or answer as to all such matters as may be necessary to his defense; and any of the pleadings in such proceeding may be amended as often as occasion may require to attain the ends of justice, and by striking out parties and adding new parties; and upon the issues thus presented, the court shall award the relief, if any, to which the petitioner is entitled.

Speed v. Cocke, 57 Ala. 209; Pinney v. Williams, 69 Ala. 215; Leigh v. O'Bannon, Ib. 261. See, also, Ex parte Garland, 42 Ala. 559.

Ib. sec. 2.

3159. Truth or sufficiency of answer may be put in issue. In any such proceeding, the return or answer shall not be conclusive, but the truth or sufficiency thereof may be put in issue and controverted.

Ib. sec. 3.

3160. Appeal to supreme court; a preferred case to be decided at first term.—From the final judgment of any circuit court, or other court exercising the jurisdiction of such court, in any such proceeding, an appeal shall lie to the supreme court as in other cases; but such appeal must be taken within thirty days after the final judgment is rendered, and shall be a preferred case in the supreme court, and shall be decided at the first term to which it is taken.

Ib. sec. 4.

3161. Bill of exceptions taken; judgment on appeal.—In addition to the questions which may be presented on such appeal to the supreme court for review under existing laws and rules of court, either party may, by a bill of exceptions, also present for review the judgment of the court upon the evidence; and the supreme court shall review the same, and, in case there is error, shall render such judgment in the cause as the primary court should have rendered, or reverse and remand the same for further proceedings, as to the supreme court may seem right.

Ib. sec. 5.

3162. Revivor in case of vacancy in office.—If any officer against whom such proceedings are had, should die, or otherwise vacate his office, while the same are pending, whether on appeal or otherwise, the same may be revived against his successor in office, in the manner in this chapter provided.

Ib. sec. 6.

3163. Proceedings to revive, when against one officer.—If such proceedings are against one officer only, and pending the

same he shall die, or otherwise vacate his office, the petitioner shall, in writing, addressed to his successor in office, briefly and succinctly set forth the character and then condition of the proceedings and the relief thereby sought, and demand of such successor the performance of the duty sought to be enforced, which writing must be personally handed to him; and if he shall fail or refuse to speedily perform the same, upon proof that such writing has been served on him, and that he has failed or refused to perform such duty properly, the court shall forthwith revive the proceedings against him, and proceed to a final determination thereof in all respects in the same manner as if no such vacancy had occurred.

3164. Proceedings abate on performance of duty by successor; costs.—If such successor, upon such demand, shall speedily perform the duty therein demanded, the proceedings shall thereby abate, and the court may render judgment for the costs of the proceedings against the person who has vacated the office, or, if he is dead, against his executor or administrator; and to this end, the court shall have the power to make his executor or administrator a party by appropriate process; but all questions of costs under this chapter shall rest in the discretion of the court. Ib. sec. 8.

3165. Proceedings to revive, when against several officers; costs.—If such proceedings are against more than one officer, and pending the same any of them shall die, or otherwise vacate the office, the proceedings may be revived against his or their successors in the same manner as if the same had been against one officer only; and if such successor or successors, not failing or refusing on demand to perform the required duty, shall in writing state his or their willingness to perform the same, and it shall appear to the court that he or they cannot perform such duty because of the failure or refusal of his or their associates in office and co-defendants to co-operate in the performance thereof, he or they shall not, in that event, be liable for any part of the costs. Ib. sec. 7.

3166. Common law not repealed; certain proceedings excepted from operation of this chapter.—The common law, as now in force in this state, touching any of the matters embraced in this chapter, is not repealed, but left in full force; the true intent and meaning of this chapter being to provide a plain, more speedy and less expensive mode of procedure in all cases to which it applies; nor shall the provisions of this chapter be held to apply to a certiorari obtained in the supreme court, upon a suggestion of diminution of the record; nor is anything in this chapter contained intended to repeal, alter, or change any statute of this state, now in force, in reference to proceedings for habeas corpus or mandamus. Ib. sec. 9.

CHAPTER 14.

ACTIONS TO VACATE CHARTERS OF PRIVATE CORPORATIONS, AND FOR USURPATION OR FORFEITURE OF OFFICES.

3167 (3419). **Actions to vacate charters of corporations; by whom instituted, and grounds for.**—An action may be brought in the name of the state, on the information of any person, for the purpose of vacating the charter, or annulling the existence of any corporation, other than municipal, whenever such corporation,—

1. Offends against any of the acts creating, altering, or renewing such corporation.

2. Violates the provisions of any law, by which such corporation forfeits its charter, by abuse of its powers.

3. Has forfeited its privileges or franchises by failure to exercise its powers.

4. Has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises.

5. Exercises a franchise or privilege not conferred on it by law.

State v. Town Council, 30 Ala. 66.

3168 (3420). **When solicitor directed to commence action; any person may sue on securing costs.**—The judge of the circuit in which such corporation is located, whenever he has reason to believe that any of these acts or omissions can be proved, and it is necessary for the public good, must direct the solicitor of the circuit or county to bring such action; or such action may be brought on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the action is brought.

Tuskaloosa Asso'n v. State, 58 Ala. 54.

3169 (3421). **In what county actions to be brought.**—Such actions must be brought in the circuit court of the county in which the corporation has its principal office, or, if it has no principal office, of any county in which it does business.

3170 (3422). **Action in name of state for usurpation of office or franchise.**—An action may be brought in the name of the state against the party offending, in the following cases:

1. When any person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state.

2. When any public officer, civil or military, has done or suffered an act, by which, under the law, he forfeits his office.

3. When any association, or number of persons, act within this state as a corporation, without being duly incorporated.

State v. Porter, 1 Ala. 688; State v. Burnett, 2 Ala. 140; State v. Town Council, 30 Ala. 66; State v. Gardner, 43 Ala. 234; State v. Falconer, 44 Ala. 696; Lee v. State, 49 Ala. 43; State v. Price, 50 Ala. 568; Ex parte Harris, 52 Ala. 87; Echols v. State, 56 Ala. 131; Davidson v. Woodruff, 68 Ala. 356; Leigh v. O'Bannon, 69 Ala. 261.

3171 (3423, 3424). **Judge may direct action to be brought; may be brought by any person securing costs.**—A judge of

the circuit court may direct such action to be brought, when he believes that any of these acts can be proved, and it is necessary for the public good; or it may be brought on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the action is brought; and such action must be brought in the circuit court of the county in which the act or acts are done or suffered.

Taylor v. State, 31 Ala. 383; State v. Town Council, 30 Ala. 66.

3172 (3425). **Informant joined as plaintiff with the state.** Whenever an action is brought, under the provisions of this chapter, on the information of any person, his name must be joined as plaintiff with the state.

3173 (2426, 3427). **In whose name continued on death of informant; when it abates.**—On the death of such person pending the suit, it may be continued in the name of the surviving informant, or of any person who, on application, having first given security for the costs, is substituted in his place; but on the death of all the informants, if no person is substituted in their place, the action abates.

3174 (3428). **Averments of complaint.**—The complaint in such action must concisely and clearly set forth the act or omission complained of.

3175 (3429, 3430). **In action for usurpation, true officer may be averred; judgment.**—When the action is brought against a person for usurping an office, the name of the person rightfully entitled to the office, with a statement of his right thereto, may be added, and, when added, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled; or only upon the right of the defendant, as justice may require.

3176 (3431). **Rights of such officer, on judgment in his favor.**—If judgment is rendered upon the right of the person so alleged to be entitled, and the same is in favor of such person, he is entitled, after taking the oath of office, and executing such official bond as may be required, to take upon himself the execution of the office; and it is his duty, immediately thereafter, to demand of the defendant all the books, papers and property in his custody, or within his power, belonging to the office; and on refusal or neglect to deliver over the same, he may be proceeded against as is prescribed by the provisions of chapter 6, title 5, in part first of this Code.

3177 (3432). **When validity of election not triable.**—The validity of no election which may be contested under this Code can be tried under the provisions of this chapter.

Davidson v. State, 63 Ala. 432; Leigh v. O'Bannon, 69 Ala. 261.

3178 (3433). **Judgment of exclusion from office or franchise; costs.**—When a defendant, whether a natural person or a corporation, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office or franchise, judgment must be rendered that such defendant be excluded from the office or franchise, and that the plaintiff recover costs against such defendant.

3179 (3434). **On judgment of forfeiture, corporation dissolved; costs.**—If it is adjudged that a corporation, against

which an action has been brought under this chapter, has, by neglect, abuse, or surrender, forfeited its corporate rights, privileges and franchises, judgment must be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and be dissolved; and judgment for costs must be rendered against the persons claiming to be such corporation, and the directors or managers thereof, as established by the evidence.

3180 (3435). **When costs against state; when against informant.**—If such action is at the suit of the state alone, and judgment is for the defendant, or the defendant is insolvent, the witnesses are paid as in other state cases; but if any person is joined with the state as informant, judgment must be rendered against him for the costs, if rendered for the defendant.

3181 (3436). **Costs on abatement.**—On an abatement of the action, judgment must be rendered against the sureties of the informant for the costs.

3182 (3437). **Execution against informant's sureties.**—In all cases under this chapter, in which judgment is rendered against the informant for costs, execution may issue therefor against his sureties.

3183 (3438). **Appeal; costs thereof.**—The state, informant, or defendant, may appeal to the supreme court within ten days after judgment, on application to the clerk and giving security for the costs of the appeal; the names of the sureties to be certified, with the record, to the supreme court; and if the appeal is not sustained, judgment for costs may be rendered against such sureties; but in appeals by the state no security shall be required.

Ala. Coal Co. v. State, 54 Ala. 36.

CHAPTER 15.

AD QUOD DAMNUM.

ARTICLE 1.—Erection of dams for mills, gins and factories.
2.—Condemnation of lands for public uses.

ARTICLE I.

ERECTION OF DAMS FOR MILLS, GINS AND FACTORIES.

3184 (3555). **Dams for water-mills, gins, or factories; by whom erected.**—A dam for any water grist-mill, saw-mill, gin, or factory, to be operated for the public, may be erected across any water-course, not a navigable stream, by the owner in fee of the land on both sides of the stream, or on one side, and of part of the bed thereof, at the place where the dam is proposed to be erected, by proceeding as in this article provided.

Hendricks v. Johnson, 6 Port. 472; Sadler v. Langham, 34 Ala. 311; Martin v. Rushton, 42 Ala. 289; Bottoms v. Brewer, 54 Ala. 288; Folmar v. Folmar, 68 Ala. 120; McAllilley v. Horton, 75 Ala. 491.

3185 (3556, 3557). **Application; to whom made.**—For authority to erect such dam, application in writing, verified by affidavit, must be made to the judge of probate of the county

in which it is proposed to erect the mill, gin, or factory, if by the owner of the land on both sides of the stream, or if by the owner of the land on one side only, to the judge of probate of the county in which the land on the opposite side of the stream, abutting the proposed site of the dam, lies.

Folmar v. Folmar, 68 Ala. 120.

3186 (3558, 3559). **Contents of such application.**—Such application must set forth the right of the applicant to make the same, the purpose or purposes for which the dam is to be erected, a description of the land by sectional divisions and subdivisions, township and range, the name of the water-course, if it have a name, the side on which the mill, gin, or factory, is to be erected, and the proposed height of the dam; and if the application is made by the owner of the land on one side only, he shall also set forth therein the name of the owner of the land on the opposite side, on which he proposes to abut, and his residence, if known, and whether such owner is a minor, or of full age; and if such owner is a person of unsound mind, that fact must also be stated.

3187 (3560). **On filing application, writ of ad quod damnum issues.**—On the filing of such application, the judge of probate must issue to the sheriff a writ, setting forth the substantial averments contained in the application, the name of the applicant, and the place where it is proposed to erect the dam, and commanding the sheriff to summon seven disinterested freeholders of the county to meet at the place where the dam is to be erected, on a day to be specified in the writ, not less than fifteen, nor more than thirty days after the filing of the application, and then and there to inquire touching the matters contained therein.

Folmar v. Folmar, 68 Ala. 120; s. c., 71 Ala. 136; Bush v. Robinson, 44 Ala. 328.

3188 (3561, 3562). **Notice to owner of opposite land.**—If such application is filed by the owner of the land on one side of the stream only, notice must be given to the owner of the land on the opposite side, by serving him, his tenant, or agent, with a copy of the writ, if to be found in the county, or if not, by posting up a copy of such writ in a conspicuous place on the land, ten days before the day specified in the writ for the meeting of the jury; and if such owner is a minor or person of unsound mind, such service must be on his guardian, or if he has no guardian, the judge of probate must appoint a guardian ad litem to protect his interest.

3189 (3563). **Notice when owner non-resident.**—If such owner is a non-resident of the state, notice must be given by publication in the newspaper published nearest to such land, once a week for three successive weeks.

3190 (3564). **Mode of executing writ; charge to and duties of jury.**—The sheriff and the jury must attend on the day appointed; and after the jury are sworn by the sheriff to discharge their duties fairly and to the best of their ability, they must be charged by him,—

1. To examine the land above and below belonging to others, which may probably be overflowed or injured, and to ascertain and assess the damages resulting from the erection of such dam to the several owners of such lands.

2. To ascertain whether the residence of any of such owners, or the outhouses, enclosures, gardens, or orchards, thereto immediately belonging, will be overflowed.

3. To ascertain whether the health of the neighborhood will probably be endangered.

4. To ascertain whether any other mill, gin, factory, or water-works will be overflowed.

Owen v. Jordan, 27 Ala. 608; Rushton v. Martin, 43 Ala. 555; Folmar v. Folmar, 68 Ala. 120; s. c., 71 Ala. 136; McAllilley v. Horton, 75 Ala. 491.

3191 (3565). **Value of one acre of land on opposite side to be assessed.**—If the applicant is not the owner of the land on both sides of the stream, the jury must also be charged to ascertain and assess the value of one acre of land on the opposite side, to include the place where the applicant would abut his dam, and to locate and circumscribe the same by metes and bounds, having a due regard to the interests of all parties.

3192 (3566). **Inquest; how made, signed and returned.** The inquest of the jury must be reduced to writing, signed by a majority of them, and delivered to the sheriff, and by him returned in five days thereafter to the office of the judge of probate.

Frost v. Barnes, 47 Ala. 279. See, also, citations to section 3190.

3193 (3567). **Parties summoned to show cause against inquest.**—On the return of the inquest, the judge of probate must summon the owner of the acre of land, if the same is assessed by the jury, and also the several owners of the land found by the inquest to be liable to damage, to appear before him on a day named in the summons, and show cause, if any they have, why the applicant should not have permission to erect his dam.

Folmar v. Folmar, 71 Ala. 136.

3194 (3568). **Ten days' notice to be given to owners of land; how given.**—Ten days' notice must be given to the several owners of such land, to show cause, if any they have, against such application, by personal service, if to be found in the county, or if not, by posting up a copy of such notice at a conspicuous place on the several tracts of the owners who cannot be so found.

3195 (3569). **When application rejected; when granted.** If, on the day appointed to show cause, or any other day to which the matter may be continued, it appears to such judge from the inquest, or from evidence introduced, that the residence of any owner, or the outhouses, enclosures, garden, or orchard, immediately belonging thereto, will probably be overflowed, or that the health of the neighborhood will probably be endangered, or that any other mill, gin, factory, or water-works will probably be overflowed, the judge must not grant the application; but if such results will not probably ensue, the application must be granted.

Frost v. Barnes, 47 Ala. 279; Folmar v. Folmar, 71 Ala. 136; Ogeltree v. McQuaggs, 67 Ala. 586.

3196 (3570). **Payment of assessment.**—If the application is granted, the applicant must, within three months thereafter, pay to the several owners, or to the judge of probate for their

use, the sums severally assessed; and a failure to make payment within such time operates a revocation of the grant.

3197 (3571). **Conditional fee vests on payment of assessment.**—On making such payment, the applicant is vested with a qualified estate in fee to the acre of land located and circumscribed by the jury, to become absolute on performance of the following conditions:

1. That the dam or mill, gin or factory, be commenced within one, and finished within three years from the date of the grant.

2. That whenever the dam or mill, gin or factory, is destroyed or materially impaired, the same must be rebuilt or repaired within three years thereafter; but if the owner of such dam is an infant or person of unsound mind, he is allowed the same length of time, after the removal of such disability, to commence, finish, rebuild, or repair.

3198 (3572). **On breach of condition, land reverts.**—On failure to comply with such conditions, the land reverts to its former owner, or his heirs.

3199 (3573). **Proceedings when canal through another's land is necessary.**—When such land joins other lands, and it is necessary for the erection of the mill, gin, or factory, to dig a ditch or canal through such other lands, the application must be made to the judge of probate of the county in which the lands through which the ditch or canal is proposed to be dug, lie; and the writ must be obtained, inquest held on the same, notice be given, the inquest returned, the owners of such other lands summoned to show cause, the application granted or refused, and damages paid, the same as in other cases provided for in this article.

3200 (3574). **Authority to raise dam higher.**—An owner or proprietor of any dam erected under this article may raise the same, on application to the judge of probate; and on such application, the same proceedings must be had as on the first application.

Bottoms v. Brewer, 54 Ala. 288.

3201 (3575). **Failure to comply with conditions avoids grant.**—If any person to whom permission to erect a dam under this article has been granted, his grantors, or heirs, fail to build, rebuild, or repair the same, together with the mill, gin, or factory, or the machinery appurtenant thereto, according to the provisions of section 3197 (3571), such failure avoids the grant.

3202 (3576). **Who may contest application.**—In all applications under this article, any person making affidavit that he is interested against the same, and giving security for the costs, if he fail to defeat such application, must, at any time before such application is granted, be permitted to make himself a party, and to contest the same.

Costs on contest.—Folmar v. Folmar, 71 Ala. 136.

3203 (3577). **Liability for building or raising dam without authority.**—Any person who builds or raises a dam or other obstruction across any water-course, except as authorized by law, and thereby works any injury to any other person, by overflowing his land, or in any other way, is liable to such person for double damages for such injury; and he may, if the same is a nuisance to the neighborhood, be prosecuted therefor.

3204 (3578). **Deputy sheriff may act.**—The duties imposed on the sheriff under this article may be performed by deputy.

3205 (3579). **Provisions as to toll.**—All grist mills established in pursuance of this article are subject to the provisions of this Code touching the order in which grain shall be ground, and the rate of toll to be charged for grinding grain, at public mills.

3206. Land-owner entitled to appeal to circuit court. From any assessment of damages made or had under this article, the land-owner, if dissatisfied, is entitled to an appeal, as matter of right, to the circuit court of the county, and on such an appeal to a trial de novo by jury; such appeal to be taken within twenty days after the application is granted, on giving security for the costs of the appeal, to be approved by the judge of probate; and on giving such security, the judge of probate must file in the office of the clerk of the circuit court a full and complete transcript of all the proceedings, including the inquest of the jury, within ten days after such appeal is taken.

ARTICLE II.

CONDEMNATION OF LANDS FOR PUBLIC USES.

3207 (3580). **Application to court of probate for order of condemnation.**—Any corporation organized under the laws of this state, or any person, or association of persons, proposing to take lands, or to acquire an interest, or easement therein, for any uses for which private property may be taken, may, if there be no other mode of proceeding prescribed by law, apply to the court of probate of the county in which such lands, or a material portion thereof, may be situate, for an order of condemnation thereof to such uses.

N. O. & S. R. R. Co. v. Jones, 68 Ala. 48; Jones v. N. O. & S. R R. Co., 70 Ala. 227; Hooper v. S. & M. R. R Co., 75 Ala. 529; Montgomery S. R. R. Co. v. Sayre, 72 Ala. 443.

3208. Application and contents.—The application must be in writing, verified by the oath of the applicant, or by the oath of an agent or attorney, and accompanied with security for the costs, and must state with certainty the name and residence of the applicant, the uses or purposes for which the land is to be taken, or the interest or easement therein to be acquired, and must state the name and residence of the owner, if known, or, if unknown, must show that reasonable diligence has been used to ascertain the same.

3209. Order of court on filing application; notice.—On the filing of the application, the court must make and enter an order appointing a day for the hearing thereof; and, if the owner of the lands resides in the state, must issue to him notice of the application, and of the day for the hearing thereof, which must be served by the sheriff, or other legal officer, at least ten days before the day appointed for the hearing; if the owner be unknown, or if he resides without the state, notice must be given by advertisement in some newspaper published in the county, or, if there be no newspaper published in the county, by posting notice at the court-house door and three other public places, for at least three weeks before the day appointed for the hear-

ing. If the owner be an infant, or be of unsound mind, notice must be served on his guardian, if any he have, resident in the state, but if he resides in the state, and has no such guardian, then upon the person who may have him in charge, or with whom he may reside; if the owner be dead, and the lands are in the possession or under the control of his personal representative, notice must be served on such representative, and on the heirs at law of the decedent; if the owner be a married woman, notice may be served on her personally, or on her husband.

3210. Jury to be summoned and impaneled.—The court must also make an order directed to the sheriff, commanding him to summon not less than eighteen, nor more than twenty-four good and lawful men of the county, having the qualifications of jurors as prescribed by law, to be and appear before the court on the day appointed for the hearing of the application; from the persons so summoned, a jury of twelve good and lawful men must be sworn and impaneled to ascertain the compensation or damages the owner of the lands is entitled to receive because of the land proposed to be taken, or because of the interest or easement therein proposed to be acquired; if from any cause a jury cannot be obtained from the persons so summoned, or ordered to be summoned, the court must order the summoning of talesmen until a jury is completed; each party is entitled to challenge peremptorily four of the jurors so summoned.

3211. Allegations, objections, and proof to be heard.—On the day so appointed for the hearing, or on such other day to which, for good cause, the court may adjourn the hearing, the court must hear the allegations of the application, and any objections which may be filed to the granting thereof, and any legal evidence touching the same; and must also receive all legal evidence that may be introduced by either party touching the measure of the damages the owner of the lands will sustain, and the amount of compensation he is entitled to receive; but the amount of compensation to which the owner is entitled must not be reduced or diminished because of any incidental benefits which may accrue to him, or to his remaining lands, in consequence of the uses to which the land proposed to be taken, or in which an interest or easement is proposed to be acquired, will be appropriated. If the applicant has unlawfully taken possession of the lands, or of the easement therein which he seeks to condemn, the damages must be assessed at the highest market value at any time from the date of the unlawful taking to the date of hearing; and in assessing such damages, all buildings, structures and improvements of every kind, erected or placed thereon by such applicant, shall be considered as belonging to the owner of the lands, and not to the applicant.

3212. Verdict of jury.—The jury, by their verdict, and under the charge of the court, from the evidence, must ascertain and assess the damages or compensation to which the owner is entitled; on the rendition of the verdict, the court must order the same to be recorded, and must make an order of condemnation in pursuance thereof, upon the payment of the damages or compensation so assessed.

3213. Infants; persons of unsound mind.—If the owner of the lands be an infant, or is of unsound mind, the court, on the

day appointed for the hearing, must appoint a guardian ad litem to represent him; and the guardian so appointed must file a written acceptance of the appointment, must appear and protect the rights and interests of such infant, or person of unsound mind; and, if he deems it necessary, may employ counsel to assist him; the compensation of such guardian and of his counsel must be ascertained by the court and taxed as costs of the proceeding.

3214. Owner not appearing.—If the owner does not appear and contest the application, the court must proceed to impanel the jury as hereinbefore provided, must hear the allegations of the application, and all legal evidence touching the same, and touching the damages the owner will sustain, and the compensation he is entitled to receive; and such damages or compensation must be ascertained and assessed by the jury, and upon their verdict the like proceedings had as hereinbefore provided.

3215. Hearing and trial.—The hearing and trial provided for herein must in all respects be conducted as trials in civil cases at common law are conducted; witnesses may be examined orally, or evidence may be taken by deposition and introduced as in cases in which such evidence may be taken and introduced in civil cases in courts of common law; on the trial and hearing either party may, by bill of exceptions, reserve any charge, opinion, or decision of the court, as in cases in which bills of exception are allowed in civil cases in courts of common law; and either party is entitled to an appeal to the supreme court from the order of the court within three months from the making thereof.

3216. Order of condemnation.—The order of condemnation, upon the payment of the sum ascertained and assessed by the verdict of the jury, shall vest in the applicant the easement proposed to be acquired, for the uses and purposes stated in the application, but for no other uses and purposes.

3217. Costs.—The costs of the application and of the proceedings thereunder, including the compensation of jurors, must be adjudged against the applicant and his surety for costs, for which execution may be issued.

3218. Time within which damages to be paid; effect of failure to pay.—The applicant may pay the damages and compensation assessed at any time within six months after the assessment thereof, or, in case an appeal is taken, within six months after the appeal is determined; but if he fails to pay the same within such time, such assessment shall cease to be binding on the owner of the lands, and the rights of the applicant thereunder shall determine; and, upon such failure, the applicant shall be liable to the owner for all damages the latter may have sustained by the institution of such proceedings, including a reasonable attorney's fee for defending the same.

3219. Foreign telegraph and telephone company.—A telegraph or a telephone company, incorporated under the laws of another state, proposing to extend connecting lines into this state, may acquire an easement for the uses and purposes of such connecting lines, and may pursue the mode of proceeding prescribed in this article.

3220. Court of probate open at all times.—The court of probate must be deemed always open for the filing and trial of all applications made under this article.

CHAPTER 16.

ARBITRATION.

3221 (3536). **Order of reference to arbitration in pending suit; continuance.**—It is the duty of all courts to encourage the settlement of controversies pending before them by a reference thereof to arbitrators, chosen by the parties or their attorneys; and, on motion of the parties, must make such order and continue the cause for award; but such continuance must not extend beyond one term, unless for good cause shown, or by consent.

Mendenhall v. Smith, Minor, 380; Thomason v. Odum, 31 Ala. 108; Davis v. Forshee, 34 Ala. 107; Shelby Iron Co. v. Cobb, 55 Ala. 636; Chapman v. Ammernam, 78 Ala. 403; Elrod v. Simmons, 40 Ala. 274.

3222 (3537). **Submission when no suit pending; award to be entered as a judgment.**—When no suit is pending, the parties to any controversy may refer the determination thereof to the decision of arbitrators, to be chosen by themselves; and the award made pursuant to the provisions of this chapter must be entered up as the judgment of the proper court, if the award is not performed.

Davis v. McConnell, 3 Stew. 492; Lamar v. Nicholson, 7 Port. 158; Tuskaloosa Bridge Co. v. Jemison, 33 Ala. 476; King v. Jemison, Ib. 499; Crook v. Chambers, 40 Ala. 239; Chambers v. Crook, 42 Ala. 171.

3223 (3538). **Submission to be in writing; contents; delivery of to arbitrators.**—The parties must concisely state in writing, signed by them, the matter in dispute between them, and that they desire to leave the determination thereof to certain persons, naming them, as arbitrators; and such submission must be delivered to the arbitrators, or one of them, together with a list of the witnesses either party may desire to examine.

Tuskaloosa Bridge Co. v. Jemison, 33 Ala. 476; King v. Jemison, Ib. 499; Elrod v. Simmons, 40 Ala. 274.

3224 (3539). **Proceedings before arbitrators; how award made and delivered.**—Thereupon, it is the duty of the arbitrators to appoint a time and place for hearing the parties and making their award, of which they must give the parties three days' notice; and if no cause is shown for a continuance, they must proceed to hear and determine the matters referred to them, and make their award in writing, which must be signed by them, and a copy thereof be delivered to each of the parties, their agents, or attorneys.

Chapman v. Ammernam, 78 Ala. 403; Callahan v. McAlexander, 1 Ala. 366; Scruggs v. Bibb, 33 Ala. 482; Tuskaloosa Bridge Co. v. Jemison, Ib. 476; King v. Jemison, Ib. 499; Davis v. Forshee, 34 Ala. 107; Crook v. Chambers, 40 Ala. 239; Horton v. Poole, Ib 629; McCrary v. Harrison, 36 Ala. 577; Wolff v. Shelton, 51 Ala. 425; Burns v. Hendrix, 54 Ala. 78.

3225 (3540). **Supplying place of arbitrator; award by majority.**—If any of the arbitrators fail to attend at the time and place designated, and the parties appear, they may substitute others in their place; or if the parties cannot agree, the arbitrators present may themselves appoint others in their stead, of

which they must make a memorandum on the submission. A majority of the arbitrators may make the award.

Horton v. Poole, 40 Ala. 629.

3226 (3541). **Return and effect of award; to what court returned.**—If the award is not performed in ten days after notice and delivery of a copy thereof, the successful party may return the submission and the award to the clerk of the circuit court of the county in which the award is made, if for the payment of more than fifty dollars, for the delivery of specific property, or to do or omit to do any particular act; if for fifty dollars, or less, then to a justice of the peace of the county; and such award has the force and effect of a judgment at law, upon which execution may issue as in other cases.

3227 (3542). **Performance of award; when enforceable by attachment.**—If the award is for the delivery of property, or to do or omit to do any particular act, on notice and motion to the court, performance may be enforced by attachment, or other appropriate writ.

3228 (3543). **Oath to be administered to arbitrators.**—Before making their award, the arbitrators must be sworn impartially to determine the matters submitted to them, according to the evidence and the manifest justice and equity of the case, to the best of their judgment, without favor or affection; which oath they may administer to each other.

Price v. Kirby, 1 Ala. 184; Crook v. Chambers, 40 Ala. 239.

3229 (3544). **Witnesses and depositions.**—The arbitrators, or either of them, have power to subpœna witnesses, at the request of either of the parties, and to administer all oaths which may be necessary in the progress of the cause; and must, on the application of either party, issue commission to take the deposition of any witness residing out of the county, which must be taken in the same manner as depositions in the circuit court, except that no oath to the materiality of the witness, or of the cause for taking the deposition, is required.

3230 (3545). **How subpœnas executed.**—Subpœnas for witnesses may be executed by the sheriff, by any constable of the county, or by the parties themselves.

3231 (3546). **Defaulting witness; fine and liability.**—Any witness duly summoned, who fails to attend without sufficient excuse, may be fined ten dollars for the use of the county, for the collection of which the arbitrators must issue execution; and such defaulting witness is also liable to the party summoning him for any injury sustained by the loss of his testimony, to be recovered before any court having jurisdiction.

3232 (3547). **Award final unless set aside for fraud, partiality, or corruption.**—An award made substantially in compliance with the provisions of this chapter is conclusive between the parties thereto and their privies, as to the matter submitted, and cannot be inquired into, or impeached for want of form or for irregularity, if the award determines the matter or controversy submitted; and such award is final, unless the arbitrators are guilty of fraud, partiality, or corruption in making it.

Price v. Kirby, 1 Ala. 184; Goodwin v. Yarbrough, 1 Stew. 152; Wright v. Balton, 8 Ala. 548; Young v. Leaird, 30 Ala. 371; King v. Jemison, 33 Ala. 499; Willingham v. Harrell, 36 Ala. 583; Davis v. Forshee, 34 Ala. 107; Elrod v. Sim-

mons, 40 Ala. 274; Chambers v. Crook, 42 Ala. 171; Wolff v. Shelton, 51 Ala. 425; Chapman v. Ammerman, 78 Ala. 403.

3233 (3547). **Appeal to supreme court.**—Either party may, however, within five days after receiving notice of the award, file in the office of the clerk, register, or judge of the court in which the cause is pending, a notice of appeal to the supreme court, and may tender to the arbitrators a bill of exceptions, setting forth all the evidence in the cause, which, with the conclusions of law of the arbitrators, and their award thereon, shall be certified by them, and returned with the papers of the cause to the court in which the cause is pending; and, either in term time or vacation, the clerk, register, or judge of the court may enter it up as the judgment or decree of the court, and it shall stand as the judgment or decree of the court, unless set aside for some of the causes specified in the preceding section; and from the judgment or decree so entered up, or from the judgment setting aside the award, an appeal shall lie as in other cases.

Collins v. L. & N. R. R. Co., 70 Ala. 533.

3234 (3548). **Arbitrations at common law not prevented.** Nothing in this chapter contained shall prevent any person or persons from settling any matters of controversy by a reference to arbitration at common law.

Martin v. Chapman, 1 Ala. 278; Byrd v. Odum, 9 Ala. 755; Strong v. Beroujon, 18 Ala. 168; Mobile Road Co. v. Yeind, 29 Ala. 325; Willingham v. Harrell, 36 Ala. 583; Brewer v. Bain, 60 Ala. 153.

3235 (3549). **Pay of arbitrators, witnesses and sheriff or constable.**—The arbitrators are, if demanded by them, entitled each to two dollars per day whilst actually engaged in the arbitration; the witnesses to one dollar per day each; and the sheriff or constable to the customary fees for executing subpœnas; all of which must be paid jointly by the parties, unless the arbitrators otherwise determine.

3236 (3550). **When witness may refuse to attend, and arbitrators to deliver award; recovery of charges.**—Any witness may refuse to testify until his fees are paid by the party summoning him; and the arbitrators may refuse to deliver copies of the award until all charges are paid; but if paid by a party not liable therefor, he may recover the same by action before any court having jurisdiction thereof; and the receipt of the arbitrators is presumptive evidence of the fact of payment, and of the liability of the party therefor.

CHAPTER 17.

PARTITION.

ARTICLE 1.—Partition of property generally.
2.—Partition of crops.

ARTICLE I.

PARTITION OF PROPERTY GENERALLY.

3237 (3497). **Partition of property held by joint owners or tenants in common.**—Any property, real, personal, or mixed, held by joint owners or tenants in common, may be divided among them, on the written application of one or more of them to the probate court of the county in which the property is situate; and such application may be made by the executor or administrator of a deceased person in interest, or by the guardian of a minor or person of unsound mind.

Bryant v. Stearns, 16 Ala. 302; Strange v. Gunn, 56 Ala. 611; Whitman v. Reese, 59 Ala. 532; Johnson v. Ray, 67 Ala. 603; Wilkinson v. Stuart, 74 Ala. 198; Ward v. Corbett, 72 Ala. 438 (overruling Stimpson v. Malone, 60 Ala. 338); Bragg v. Beers, 71 Ala. 151; Terrell v. Cunningham, 70 Ala. 100.

3238 (3499, 3500). **Application when land lies in different counties; certificate and record.**—When partition is sought of a tract of land lying partly in different counties, the application may be made to the probate court of either county, and the partition shall be made at the court-house of the county of the judge of such court; and when made, the judge of such court shall, on demand and payment of lawful fees therefor, furnish to each party in interest a certificate, under his official seal, of the lots or parcels allotted to him, and of the book and page where the proceedings are recorded; and the record of such certificate in the proper office of the county in which such lots or parcels, or any part thereof, lie, shall operate as notice of its contents.

3239 (3498). **Contents of application.** — The application for division or partition must set forth the names of all the persons interested in the property, their residence, if known, whether they are over or under twenty-one years of age, a full and accurate description of the property sought to be divided or partitioned, the interest of each person in the same, and the number of shares into which it is to be divided.

See citations to section 3237.

3240 (3501). **Hearing and notice; guardian ad litem; how non-residents made parties.**—Upon the filing of the application, a day, not less than thirty days thereafter, must be appointed for hearing the same; and of the time and place of such hearing, all parties in interest must have at least ten days' notice; and when infants or persons of unsound mind are parties, guardians ad litem must be appointed to represent them; and if any of the parties in interest are non-residents, they must be made parties in the same manner, and to the same extent, as is done when property in the hands of an executor or administrator is to be divided or distributed.

3241 (3502). **Appointment of commissioners; how proof taken when minors interested in lands.**—If, upon the hearing, the court is satisfied from the proof that the property described in the application is held and owned jointly, or in common, it must decree the same to be divided or partitioned among the joint owners or tenants in common, according to their respective interests therein; and to effect such division or partition, it must appoint suitable commissioners, not more than five, any three of whom may act; but if the application be for the partition of lands, and any of the parties interested are minors, the court, before granting the application, must be satisfied by evidence taken as in chancery cases, that it is to the interest of such minors that the partition be made.

3242 (3503). **Oath and duties of commissioners.**—The commissioners must be sworn faithfully to execute the trust imposed in them, and to make the division or partition fairly and impartially, if the same can be made; and the division or partition shall be conducted in all respects, as nearly as may be, consistently with the provisions of this article, as is done when property in the hands of an executor or administrator is to be distributed or divided; and in case of application for partition of lands, the commissioners must, after examining the lands, and a survey thereof, if necessary, proceed without delay to make division thereof into the necessary number of shares, having regard to the quality of the soil, and other advantages, so as to make the different shares as nearly equal in value as practicable; and they must make a plat and map thereof, showing the subdivisions and boundaries of the lots, and numbering them progressively; and they are authorized to employ a surveyor, and chain-bearers, and other attendants, if necessary.

3243 (3504). **Notice of time of making partition of lands.** In case of partition of lands, the commissioners must give notice, by publication in some newspaper published in the county, if there be one, or if not, in the one nearest thereto, to be made not less than three successive weeks, that they will, on a day designated, attend at the court-house of the county to make partition.

3244 (3505). **Partition made by lot, and result returned.** On the day designated, the commissioners must, in the presence of the judge of probate, determine by lot to whom each of the several parcels belongs, and make a statement in writing of the result, setting forth to whom the several parcels or lots were allotted, together with all the facts relating to the partition and allotment, which must be signed by them, and attested by the judge of probate.

3245 (3506). **Papers filed and registered as conveyances.** The application, commission, statement of the commissioners, and plat and map must be filed in the office of the judge of probate, and, together with all orders made by him, must be recorded in a book kept by him for the record of conveyances of land, and when recorded, the record thereof shall be presumptive evidence of the truth of any fact therein stated.

3246 (3507). **Partition vests title; but may be set aside in chancery for fraud.**—The partition so made vests a title in fee-simple in the persons to whom the several shares are allotted, as fully and completely as if each had conveyed to the

others; but if any fraud or undue influence be employed by any of the parties to obtain an unfair partition or allotment, such partition may be annulled by the chancery court, on bill filed within five years after the allotment.

3247 (3508). **Lien against one attaches only to his share.** When there is a lien on an individual interest of any of the parties, such lien, if a partition is made, is thenceforth a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.

3248 (3509). **New commissioners appointed if necessary.** If any of the commissioners die, resign, or neglect or refuse to act, at any time before the final allotment, others may be substituted in their stead by the probate court, and they shall have the same power in completing such partition and allotment as if they had been originally appointed.

3249 (3510). **Fees of commissioners.**—The commissioners are entitled to two dollars per day for each day whilst engaged in such partition and allotment, and all expenses they may have incurred in causing survey, map and plat to be made, or otherwise, in the discharge of their duties.

3250 (3511). **Costs and expenses; execution may issue therefor.**—The probate court must ascertain the costs and expenses attending the division, and make a record thereof, stating distinctly each item of such costs and expenses; and if the same are not paid within thirty days after the allotment, an execution may be issued against each of the persons to whom the land was allotted, for his aliquot proportion thereof, which must be directed to the sheriff, to be levied as other executions, and may be levied on the land so allotted to him.

3251 (3512). **No partition when adverse claim is set up or made known.**—No division or partition can be made under this article, when an adverse claim or title is asserted by any one, or brought to the knowledge of the commissioners, or of the judge of probate.

3252 (3513). **The remedy herein provided not exclusive.** The power hereby conferred does not prevent a resort to any other lawful mode of obtaining partition of lands.

3253 (3514). **Sale for distribution.**—Any property, real, personal, or mixed, held by joint owners or tenants in common, on the written application of any one or more of them, may be decreed to be sold by the probate court of the county in which such property is situate, or, in case of land lying partly in different counties, of either of such counties, when the same cannot be equitably divided or partitioned among them, notwithstanding they, or any of them, are infants, or persons of unsound mind; and the application may be made by the executor or administrator of a deceased person in interest, or by the guardian of a minor or person of unsound mind.

Wimberly v. Wimberly, 38 Ala. 40; Guilford v. Madden, 45 Ala. 290; Fennell v. Tucker, 49 Ala. 453; McCorkle v. Rhea, 75 Ala 213; Turnipseed v. Fitzpatrick, Ib. 301; Jones v. Jones, 56 Ala. 612; McIntosh v. Reid, 45 Ala. 456; Hutton v. Williams, 35 Ala. 503; Kellam v. Richards, 56 Ala. 2[illegible]; Whitlow v. Echols, 78 Ala. 206; Lyon v. Powell, Ib. 351.

3254 (3515). **On filing application, day set for hearing.** Upon the filing of such application, setting forth that the prop-

erty cannot be equitably divided or partitioned without a sale thereof, a day must be appointed, not less than thirty days thereafter, for hearing the same.

3255 (3516). **Hearing; notice; guardian ad litem; how non-residents made parties.** — All parties in interest must have at least ten days' notice of the time and place set for the hearing of such application; and when infants or person of unsound mind are parties, guardians ad litem must be appointed to represent them; and if any of the parties in interest are non-residents, they may be made parties in the same manner, and to the same extent as is done when property in the hands of an executor or administrator is to be divided or distributed.

Jones v. Jones, 56 Ala. 612.

3256 (3517). **Evidence taken as in chancery cases; what must be proved.**—Evidence in support of such application must be taken as in chancery cases, and before granting the decree of sale the probate court must be satisfied from the evidence that an equitable division or partition cannot be made; and when the application is by the guardian of an infant or person of unsound mind, the court must also be satisfied from the evidence that it would be to the interest of such infant, or person of unsound mind, to sell the property for the purpose of division or partition.

Coker v. Pitts, 37 Ala. 692; Fennell v. Tucker, 49 Ala. 453

3257 (3518). **Decree, appointment of commissioner, sale, collection of purchase-money, and conveyance.** — If, upon the hearing, the court is satisfied from the proof, that such property cannot be equitably divided or partitioned among the parties in interest, it must decree the same to be sold, and make and issue all such orders as may be necessary to effect the sale thereof, and appoint a suitable commissioner to make the sale; and the sale shall be conducted, the purchase-money collected, conveyance of the title made, and all proceedings subsequent to the sale conducted in every respect as is done when property in the hands of an executor or administrator is to be distributed.

3258 (3519). **Payment and distribution of the purchase-money.** — Such commissioner may discharge himself from all liability for money received by him for the property sold, by paying over the same to the judge of probate, after deducting therefrom the costs and expenses attending the sale, including commissions to him at the same rate that executors or administrators receive for collecting and disbursing, but in no case more than one hundred dollars; and such net proceeds must be distributed by the judge of probate among the persons entitled thereto, according to their respective interests.

McKee v. Griffin, 66 Ala. 211.

3259. New commissioner appointed if necessary.—If the commissioner dies, resigns, or neglects, or refuses to act, at any time before the sale, another may be substituted in his stead by the court, who shall have the same power in completing the sale as if originally appointed.

3260 (3520). **Provisions applicable to representative of party in interest.** — Should any of the parties interested in property, real, personal, or mixed, held by joint owners or

tenants in common, die, the provisions of this article shall fully apply to his executor or administrator.

3261. Not applicable to partition of crops.—The provisions of this article are not applicable to the partition of crops.

3262. Jurisdiction of chancery court to divide or sell for division.—The chancery court shall have concurrent jurisdiction with the probate court to divide or partition, or to sell for division or partition, any property, real, personal, or mixed, held by joint owners or tenants in common.

ARTICLE II.

PARTITION OF CROPS.

3263 (3521). **Partition of crops among joint owners or tenants in common.**—Matured crops of corn, cotton, or other produce, raised and made by persons in such manner as to make them joint owners or tenants in common therein, whether gathered or ungathered, may be divided among them, on the written application of any one or more of them to the probate court of the county in which such crops, or any portion thereof, are situate; and such application may be made by the administrator or executor of a deceased person, or by the guardian of a minor or person of unsound mind, interested in such crops.

Gassenheimer v. Huguley, 64 Ala. 83.

3264 (3522). **Contents of application.**—Such application must set forth the names, ages and places of residence of all the persons interested in the crops, the location, value and description of the crops, the number of shares into which it is sought to divide them, the interest of each person therein, and who is in the actual possession thereof; and it must be sworn to by the applicant, his agent, or attorney.

3265 (3523). **Day appointed for hearing; appointment of guardian ad litem.**—Upon the filing of such application, a day must be appointed for the hearing of the same, within fifteen days thereafter, if the parties are residents of this state, but if they are non-residents, within thirty days thereafter; and if any of the parties in interest are minors or persons of unsound mind, guardians ad litem must be appointed to represent them, unless they have general guardians who will represent them on the hearing.

3266 (3523). **Notice of hearing; how given.**—Notice of such application, and of the day appointed for its hearing, must be issued by the judge of probate to the parties in interest who are residents of this state, which must be served on them at least five days before the day appointed for the hearing; and if any of the parties in interest are non-residents, such notice must be given by publication, once a week for three successive weeks, in some newspaper published in the county, or if no newspaper is published therein, then in one that is published in an adjoining county, a copy of which shall be mailed by the judge of probate, directed to such non-residents at their post-offices, if the same are known, or can be ascertained by reasonable effort.

As amended, Jan. 17, 1879, p. 74.

3267 (3524). **When sheriff ordered to take possession of crops.**—If, at the time of filing such application, or afterwards, any party interested in the crops, his agent, or attorney, makes affidavit before the judge of probate, that he has cause to believe that the crops, or any portion thereof, will be removed, sold, consumed, or destroyed, before they can be divided, and gives bond, with sufficient surety, in double the value of the property to be divided, payable to the defendant or defendants, with condition to pay all costs and damages that may accrue from the wrongful filing of the application, the court shall order the sheriff to take possession of such crops, and to safely keep the same until final disposition thereof shall be made by the court, unless the other parties in interest, or some of them, give bond, with sufficient surety, to be approved by the sheriff, in double the value of the shares of those complaining, with condition for the delivery of such crops to the sheriff within five days after judgment, or, in case of default, to pay those entitled the value of their interests in the crops, together with all costs and damages for the detention of the same; and if the crops are not delivered according to the condition of the bond, any of the parties in interest may sue on the bond, jointly or severally, in the name of the sheriff for their use, and recover the value of their interests in the crops, and the costs and damages resulting from the detention.

3268 (3525). **Decree of partition or sale; liens in favor of parties declared and enforced.**—If, on the hearing, the court is satisfied from the evidence, that the parties are joint owners or tenants in common in the crops, a decree must be entered, declaring the interest or share each has therein, and ordering the crops divided in specie, or sold for division, as may appear from the evidence more practicable and better for the interests of the parties; and if any liens exist on the crops, or on any interest or share therein, in favor of any of the parties, such liens, and the extent and amount thereof, must be declared; and if a division in specie is ordered, such liens shall be charges only on the shares of the parties against whom they exist; but if a sale be ordered, the proceeds of the shares or interests upon which they exist, after payment of their part of the costs, shall be applied to the satisfaction of such liens.

3269 (3534). **Liens in favor of strangers; how adjusted.** When any lien exists on the crops, or on any share or interest therein, in favor of any person other than the joint owners or tenants in common, such person must be made a party to the application, and his lien declared and protected; and if division in specie is made, such lien shall thenceforth rest only on the share or interest of the party against whom it exists; but if a sale is made, such lien shall be satisfied out of the proceeds of the share or interest upon which it exists; but such share or interest must first be made to contribute its share of the costs.

3270 (3526). **Sale by sheriff; proceeds distributed by judge of probate.**—If the crops are ordered sold, the judge of probate must forthwith issue a writ, directed to the sheriff, commanding him to sell such crops for division, at a place to be designated in the decree and writ; and thereupon the sheriff must proceed to advertise and sell such crops at the place designated, in the same manner as he is required to advertise and sell personal property under execution issuing from the circuit court;

and after making the sale, he shall forthwith make due return, and pay over the proceeds thereof to the judge of probate, who shall distribute the same among the parties according to their respective interests. If a forthcoming bond has not been executed under section 3267 (3524), and the sheriff is not in possession of the crops, he shall seize the same for the purpose of making a sale thereof, if in the hands of any of the parties to the proceedings.

3271 (3527). **Commissioners appointed to make partition; oath and return.**—If a division of the crops is decreed, the judge of probate must forthwith issue a writ, directed to the sheriff, and commanding him to summon three disinterested and intelligent householders of the county, not related to either of the parties, to make such division, who shall divide the crops among the parties according to the decree, a copy of which must accompany the writ, and shall, within ten days after their appointment, make due return of the division made by them in writing and under oath, which oath must be taken before the judge of probate, and must set forth that they made the division fairly and impartially, to the best of their knowledge and ability; and for the purpose of such division the sheriff, if not in possession, and no forthcoming bond has been given under section 3267 (3524), must seize the crops to be divided, if in the possession of any of the parties to the proceedings.

3272 (3527). **If partition cannot be made, crops must be sold.**—If the commissioners find it impracticable to make division of the crops in specie, or that it is necessary to sell a portion thereof to make or equalize the division, they shall at once report that fact to the probate court, which shall thereupon order the crops to be sold for division, and shall issue a writ to the sheriff commanding him to make such sale; and such sale, and the distribution of the proceeds thereof, shall be made as provided in section 3270 (3526).

3273. New commissioners appointed if necessary.—If any of the commissioners for any cause fail to act, others may, at any time before division made, be appointed in their stead, and they shall have the same power as if they had been originally appointed.

3274. If condition of forthcoming bond is broken, sheriff makes return of that fact.—If a forthcoming bond is given under section 3267 (3524), and the crops are not delivered to the sheriff, as required by its condition, the sheriff must indorse on the bond the failure to deliver such crops to him, and must return the same to the judge of probate.

3275 (3528). **Contest of commissioners' report; proceedings if report set aside.**—Any of the parties may file objections to the report of the commissioners making the division, within ten days after the same is returned, and, when filed, a day must be appointed to hear the same, of which notice, not exceeding ten days, shall be given to all the other parties in interest; and on the evidence adduced on such hearing, the report shall be confirmed or set aside, as equity and justice may demand; and if the report is set aside, new commissioners shall be appointed to make division, who shall proceed as herein provided of those originally appointed.

3276 (3529). **When shares delivered to parties after partition.**—If all the parties consent in writing, the sheriff, immediately after the division is made, shall deliver to each party his share of the crops; but if such consent is not given, the crops must be held by him until after the report of the commissioners has been confirmed, when he shall deliver the same to the parties entitled thereto, unless a supersedeas bond on appeal is given.

3277 (3531). **Trial by jury; when may be had; how jury organized.**—Either party shall be entitled to a trial by jury, on demand made therefor at any time before the hearing, and the jury shall decide the facts under the charge of the judge. When a jury is demanded, the court shall order the sheriff to summon twelve men, or, by agreement of the parties, any less number, competent to serve as jurors; and the mode of swearing, impaneling, challenging, and supplying the places of jurors shall be the same, so far as practicable, as in the circuit court, on the trial of civil causes.

3278 (3532). **Costs and fees; how taxed.**—The probate court may tax the costs against the unsuccessful party litigating, or against the crops, which may be sold in amount sufficient to satisfy the same, if not paid; but each share shall be charged with only its proportion of the costs. If the crops involved are worth less than one hundred dollars, the judge, sheriff, jurors, commissioners, and witnesses shall only be allowed half the fees for similar services in other cases; if over one hundred dollars, the same fees as they are allowed for such services in other cases.

3279 (3530). **Right of appeal; how decree superseded on appeal.**—Any of the parties may, within ten days thereafter, appeal to the circuit or supreme court from the decree of partition or sale, or from the decree confirming or setting aside the commissioners' report, under the regulations governing appeals in other cases from decrees of the probate court to the circuit or supreme court; and such decree may be superseded pending the appeal by the appellant, on giving bond in double the amount of the value of the interests of the other parties in the crops, with sufficient surety, to be approved by the judge of probate, and with condition to have the crops forthcoming to abide the decree to be finally rendered in the cause, and in the event of his failure to do so, to pay all costs and damages arising therefrom.

3280 (3533). **Papers filed, but not recorded unless requested; effect as evidence.**—All papers connected with the proceedings shall be filed, but shall not be recorded unless one or more of the parties request it, in which case such party or parties shall pay the costs thereof; and the papers, or the record thereof, shall be evidence of title between the parties and their privies, to their respective shares of the crops.

3281 (3535). **Provisions apply to assignees; remedy not exclusive.**—The provisions of this article shall apply to the assignee of any joint owner or tenant in common; but the remedy hereby given shall not prevent a resort to any other remedy allowed by law.

CHAPTER 18.

SALVAGE.

3282 (2863). **Property adrift.**—All property adrift may be taken up by any person and secured.

3283 (2864). **Appraisement of such property.**—Such person must, within two days after the same is taken up, exhibit the property to a justice, and if, in his opinion, it is worth over thirty dollars, he must issue an order of appraisement to three disinterested freeholders or householders, who, after being duly sworn to estimate the value of such property fairly, must appraise and certify the same to the justice of the peace, with a description of the property; if not exceeding the value of thirty dollars, the justice must make the appraisement and description of the property.

3284 (2865). **Copy of appraisement to taker; original retained.**—The justice must give to the taker a copy of the appraisement and description of the property, retaining the original.

3285 (2866). **Notice when value over thirty dollars.**—If the appraised value is over thirty dollars, the taker must, within ten days thereafter, give notice thereof, once a week for three successive weeks, in the newspaper published nearest to the place where the property was taken up.

3286 (2867). **Contents of notice.**—Such advertisement must state the name of the taker, the time and place, a description of the property, with its marks, and the name of the owner, if known, its appraised value, and where the same is secured or deposited.

3287 (2868). **Notice when not worth more than thirty dollars.**—If the property is not worth exceeding thirty dollars, the same must be advertised at the next steamboat landing, if the property was taken up on a navigable stream, otherwise, at the nearest public place, within five days after the taking up.

3288 (2869). **On proof of title, property restored.**—The owner may, on notifying the taker, or the person in possession, and proving the property by his own oath, or the oath of another, satisfactorily to a justice of the peace, obtain from such justice an order to restore such property on the payment of the legal costs and charges thereon.

3289 (2870). **Compensation of taker.**—The taker is entitled to ten per cent. on the appraised value of each bale of cotton, and on other property as follows: Twenty-five per cent. on all under thirty dollars; between thirty and one hundred dollars, twenty per cent.; between one hundred and five hundred dollars, fifteen per cent.; between five hundred and one thousand dollars, ten per cent.; and on all over one thousand dollars, five per cent.

3290 (2871). **Also to be paid his charges.**—The taker is also entitled to the justice's fees paid by him, the expenses of the advertisement, if published in a newspaper, and reasonable compensation for the keeping, if necessary to preserve the prop-

erty from loss or injury, to be ascertained as in the case of estrays.

3291 (2872). **Fees of appraisers.**—The appraisers, other than the justice, are entitled to two dollars each, to be paid by the taker.

3292 (2873). **Time allowed to make claim; if no claim made, property vests in taker.**—The owner may prove his property, if appraised at not more than thirty dollars, within three months; between thirty and one hundred dollars, in six months; at more than one hundred dollars, within one year after the appraisement; and on failure to do so, the right to the same is vested in the taker, under the provisions of this chapter.

3293 (2874). **Remedy of owner when taker refuses to deliver property.**—If the taker, or the person in possession of the property, fails to deliver the same to the owner on the order of the justice, and the payment of, or offering to pay all legal costs, charges and expenses for keeping, such owner may recover the same; and the person failing also forfeits, to any person suing for the same, double the appraised value of the property.

3294 (2875). **Penalty for concealing, destroying, etc., the property so taken up.**—If any person conceals, destroys, injures, obliterates, or defaces any mark, or disposes of, or carries beyond the state any property taken up adrift, before the expiration of the time allowed by this chapter for the owner to prove his property, he is liable to such owner to the extent of the injury he may sustain thereby.

3295 (2876). **On death of salvor, his representative acts.** If the taker dies before the expiration of the time allowed to the owner to prove his property, all the provisions of this chapter, in relation to the giving up of the property, apply to his personal representatives.

CHAPTER 19.

INJURY TO TREES AND WATER-CRAFT.

3296 (3551). **Damages for destruction, injury, or removal of trees.**—Any person who cuts down, deadens, girdles, or destroys, or takes away, if already cut down or fallen, any cypress, pecan, oak, pine, cedar, poplar, walnut, hickory, or wild cherry tree, or sapling of that kind, on land not his own, willfully and knowingly, without the consent of the owner of the land, must pay to the owner ten dollars for every such tree or sapling; and for every other tree or sapling not hereinbefore described, so cut down, deadened, girdled, destroyed, or taken away by any person, he must pay to such owner the sum of five dollars.

Russell v. Irby, 13 Ala. 131; Givens v. Kendrick, 15 Ala. 648; Rosser v. Timberlake, 66 Ala. 89; Beatty v. Brown, 76 Ala. 267.

3297 (3552). **Damages for destruction or injury of fruit or ornamental tree, etc.**—Any person who cuts down, digs up, girdles, destroys, or mutilates any fruit tree, or ornamental tree, or shrub, bush, or plant, which is enclosed on premises not

his own, willfully and knowingly, without the consent of the owner, must pay to such owner fifteen dollars for every such tree, shrub, or plant.

3298 (3553). **Damages for injuries to canoe, boat, or water-craft.**—Any person, who, without the consent of the owner, destroys, or who, without such consent, looses, sinks, or takes away, and fails to return, any canoe, boat, or water-craft, must pay to the owner double the value thereof; or if taken away, loosed, or sunk, and returned, but not in as good condition as when taken away, loosed, or sunk, such person must pay to the owner twenty-five dollars, and the expense of putting it in such condition.

3299 (3554). **Court in which suit must be brought; limitation; to what no bar.**—Any action for the specific penalties given by this chapter may be brought in any court of competent jurisdiction, and must be brought within one year from the time the injury was committed, and not after; and neither suit brought, nor penalty incurred, under any of the provisions of this chapter, is a bar to any action for further damages, or to any criminal proceeding for any offense included in the acts for which such penalties are herein imposed, or connected therewith.

Washington v. Timberlake, 74 Ala. 263.

TITLE III.

CIVIL PROCEEDINGS BEFORE JUSTICES OF THE PEACE, AND ON APPEALS FROM THEIR JUDGMENTS.

CHAPTER 1.—General rules of procedure.
2.—Summary judgments.
3.—Attachments.
4.—Executions.
5.—Trial of right of property.
6.—Trial by jury.
7.—Forcible entry and unlawful detainer.
8.—Appeals, and proceedings thereon.

CHAPTER 1.

GENERAL RULES OF PROCEDURE.

3300 (3602). **Time and place of trial.**—Justices of the peace must designate certain days, at least once a month, and appoint a particular place within their precincts for the trial of civil causes; but, in cases of emergency, they may make their process returnable at any other time or place; and at such time and place all civil actions and proceedings cognizable before them must be tried, unless otherwise provided.

3301 (3604). **How suits commenced; form of summons.** Civil suits before justices of the peace, unless otherwise pro-

vided, must be commenced by a summons issued by him, with the cause of action indorsed thereon; and the form of the summons must be in substance as follows:

"The State of Alabama, } To any lawful officer of the county
——— county. } of ——:

"Summon —— —— to appear before me, on the —— day of —— next, at ——, (designating the place), to answer the complaint of —— ——, and there make return of this summons.

"Witness my hand, this, the —— day of ——, 18—.

"——— ———, Justice of the Peace."

3302 (3605). **Service of summons.**—The summons must be executed three days before the return-day thereof, by personal service on the defendant.

3303 (3606). **In what precinct suit to be brought.**—Unless otherwise provided, no person can be sued out of the precinct of his residence, or of that in which the debt was created, or the cause of action arose; and if suit is brought contrary to the provisions of this section, it must, on motion, be dismissed by the justice.

Thompson v. Clopton, 31 Ala. 647; Atkinson v. Wiggins, 69 Ala. 190.

3304 (3607). **When there are several defendants.**—When there are more than one defendant, the suit may be brought in the precinct of the residence of any one of them.

3305 (3608). **When there is no justice in precinct.**—If there is no justice, or notary public having the jurisdiction of a justice, within the precinct of the defendant's residence, or if he is from any cause incompetent to try the cause, the summons must be issued and the cause tried by the justice of an adjoining precinct competent to try the same.

3306 (3609). **When branch summons may issue.**—When a joint or joint and several cause of action exists, and the defendants reside or may be found in different counties, original and branch summons may be issued by any justice of the peace having jurisdiction of any one of such defendants, and be executed in any county, and must be returned and filed with the justice of the peace issuing the same, and shall constitute but one suit, in the same manner as if only one summons had issued against all the defendants; and it shall be the duty of the justice of the peace, on issuing such branch summons, to indorse thereon that it is a branch of the original suit, and that all the summons constitute one suit, and are for one and the same cause of action.

3307 (3610). **Taking of depositions and examination of witnesses.**—The depositions of witnesses in cases before justices of the peace may be taken, on application to the justice, in the same manner, and upon the same grounds as in cases in the circuit court, and also when the witness is a non-resident of the county and lives ten miles from the place of trial; in all other cases, witnesses must be examined orally before the justice.

3308 (3611). **Issue and service of subpœnas.**—The justice, on the application of either party, must issue subpœnas for witnesses, stating therein the names of the parties, by whom the witness is summoned, and the time and place of trial; which

must be executed by the constable in the same manner as the summons.

3309 (3612). **Service of subpœna in another county.** Where the witness is not a resident of the county, but resides within ten miles of the place of trial, computing the distance by the route usually traveled, the subpœna may be served either by a constable of the county in which it was issued, or by one in which the witness resides; but in the latter case, a justice of such county must certify that he is an acting constable thereof.

3310 (3613, 3614). **Fine against defaulting witness.** — If any witness duly summoned fails to attend, a conditional fine of ten dollars may be entered against him by the justice, which must be made absolute, if the witness, upon notice issued by the justice, and served three days before the trial, fails to make a sufficient excuse, either in person, by some one who knows the facts constituting the excuse, or by affidavit before some officer authorized to administer oaths, and presented at the time designated for the trial thereof; and if the fine is made absolute, execution must issue therefor, and the proceeds, when collected, must be paid to the county treasurer.

3311 (3614). **Attendance, how enforced; liability.**—A witness may also be compelled by attachment to appear and testify; and he is also liable to the party summoning him for any injury caused by the want of his testimony.

3312 (3615). **Fees to witnesses.**—Witnesses are entitled to fifty cents per day while in attendance on the trial, to be taxed as part of the costs.

3313 (3603, 3617, 3662). **What circuit court rules applicable.**—As to parties, trial, competency of witnesses, admissibility of evidence, regulation of suits, and the time within which suits may be brought, unless otherwise provided, suits before justices of the peace shall be governed by the same rules and provisions, so far as they are applicable, as suits in the circuit court.

Bullock v. Ogburn, 13 Ala. 346; Pike v. Bright, 29 Ala. 332; Levystein v. Marks, 56 Ala 564.

3314. Judgment by default or nil dicit.—No judgment by default or nil dicit shall be entered by a justice of the peace until twelve o'clock of the day to which the process is returnable.

3315 (3630, 3631). **Set-off and recoupment in such suits.** The rules and provisions of law relating to set-off and recoupment, which prevail in the circuit court, shall also, so far as applicable, prevail in suits before justices of the peace; and the defendant, if his demand is greater than that of the plaintiff, may have judgment for the residue, if it does not exceed one hundred dollars; if it exceeds that sum, and the defendant enters on the docket of the justice satisfaction of so much of his claim as equals the amount of the plaintiff's demand, as ascertained by the justice, and tenders the plaintiff a receipt therefor, judgment must be rendered in favor of the defendant for costs; and the amount so entered on the docket shall be taken as a credit on the defendant's demand.

Smith v. Fleming, 9 Ala. 768; Bowman v. Gary, Minor, 326; Wharton v. King, 69 Ala. 365.

3316 (3660). **Effect of death of either party.**—When any of the parties to a suit die during its progress, the suit abates, unless the cause of action survives, when it may be revived within six months thereafter, by five days' notice to the legal representative to appear and prosecute or defend the suit, unless such legal representative voluntarily makes himself a party; and upon the death of the defendant being made known to the justice, he must continue the cause six months.

3317 (3618). **Judgments in detinue.**—In actions for the recovery of specific personal property, the justice must ascertain the value thereof, and render judgment for the property, if to be had; if not, then for its value; and execution must issue accordingly.

3318 (3633). **Effect of judgment as a bar.**—A judgment rendered by a justice of the peace on the merits of the case is a bar to any other suit for the same cause of action.

Boswell v. Tunnell, 10 Ala. 958; Waddle v. Ishe, 12 Ala. 308.

3319 (3634). **Evidence of judgment.**—A statement of any judgment rendered by a justice of the peace, made and certified by him, or his successor in possession of his docket, is presumptive evidence of the fact.

Ware v. Roberson, 18 Ala. 105; Burns v. Campbell, 71 Ala. 275; Watson v. State, 63 Ala. 19.

3320 (3635). **Completion of unfinished business on vacancy in office.**—When a justice of the peace dies, resigns, or removes from his precinct, the remaining justice of the peace, or if there is none, the nearest justice to his place of residence, is authorized to complete the unfinished business, in the same manner as if it had been commenced before him.

CHAPTER 2.

SUMMARY JUDGMENTS.

3321 (3663). **Rendered on motion and five days' notice.** Judgments, not exceeding one hundred dollars, may be rendered on motion by justices of the peace in favor of the party aggrieved, or the other persons in this chapter specified, against the persons therein named, five days' notice thereof in writing being given, specifying the cause for which such motion will be made, and the time and place.

McMahan v. Kyle 9 Port. 507; Evans v. Stevens, 8 Ala. 517; Henderson v. Plumb, 18 Ala. 74; Abrams v. Johnson, 65 Ala. 465; James v. Auld, 9 Ala. 462; Couch v. Atkinson, 32 Ala. 633.

3322 (3664). **Against justices for acting after vacating office.**—Against any justice of the peace, for acting in an official capacity as such, after his office has been vacated by removal from the precinct for which he was elected, or from any other cause, for forty dollars, one-half thereof to the use of the county, and the residue to any one who will sue for the same.

3323 (3665). **Against justices for failure to pay over money.**—Against any justice of the peace, for failure to pay over any money received or collected by him by virtue or under

color of his office, after demand made, for the amount so received or collected, with five per cent. a month thereon from the time of the demand.

Harper v. Howard, 3 Ala. 284.

3324 (3667). **Against constables for acting after vacating office.**—Against any constable, for acting as such after removal from the precinct for which he was elected, or after his term of office has expired, or has been vacated from any cause, for forty dollars, one-half to the use of the county, and the residue to any one who will sue for the same.

3325 (3668). **Against constables or sheriffs for failure to make money.**—Against any constable or sheriff, for failing to make the money on an execution issued by a justice, which, by due diligence, might have been made, for the amount of the execution and interest, and five per cent. damages on the amount thereof.

3326 (3669). **Against constables or sheriffs for failure to pay over money.**—Against any constable or sheriff, for failing to pay over money collected or received by virtue of any execution, attachment, or other process, issued by a justice, on demand by the plaintiff, his agent, or attorney, for the amount so received, and five per cent. per month thereon from the time of the demand.

Morgan v. Billings, 3 Ala. 172.

3327 (3670). **Against constables or sheriffs for failure to execute summons.**—Against any constable or sheriff, for failing to execute any summons issued by a justice, which, by due diligence, could have been executed, for a sum not more than ten, nor less than five dollars.

3328 (3671). **Against constables or sheriffs for failure to levy an attachment.**—Against any constable or sheriff for failing to execute process of attachment, returnable before a justice, which, by due diligence, could have been executed, whereby the plaintiff has lost his debt or demand, for the amount of such debt or demand, and interest.

Thompson v. Acree, 69 Ala. 178.

3329 (3672). **Against constable or sheriff for failure to make return, or for making false return.**—Against any constable or sheriff for neglecting to make return of any summons, execution, or other process, returnable before a justice, or for making a false return thereof, for a sum not more than twenty, nor less than five dollars.

Condry v. Henley, 4 Stew. & Port. 9; Starnes v. Pierce, 2 Port. 227; Gayle v. Weir, 3 Port. 193; McMahon v. Kyle, 9 Port. 507; Robertson v. Coker, 11 Ala. 466; Henderson v. Plumb, 18 Ala. 74; Peck v. Colby, 31 Ala. 252.

3330 (3673). **In favor of constables or sheriffs in indemnity bond.**—Judgment may, in like manner, be rendered in favor of any constable or sheriff against the obligors in any bond, or promisors in any undertaking to indemnify him in levying an attachment or execution returnable before a justice of the peace, for the amount which was rendered against such constable or sheriff for making such levy, on three days' notice of the motion therefor.

3331 (3674). **Venue of motion; judgment against sureties.** The motions authorized by this chapter may be made before

any justice of the peace of the county in which the parties moved against, or any of them, reside, and judgments may be obtained therein against the justice of the peace, constable, or sheriff, and such of the sureties on his official bond as may be notified that such motion will be made, or against either of them.

3332. Limitation of certain motions.—The motions authorized by sections 3323 (3665) and 3326 (3669) must be made within six months after demand made for the money received or collected.

3333 (3675). **When motion made in circuit court.**—When the amount claimed, by reason of interest or damages, exceeds the sum of one hundred dollars, the motion must be made in the circuit court of the county in which the parties moved against, or some of them, reside, unless a remittitur is entered for the excess.

CHAPTER 3.

ATTACHMENTS.

3334 (3682). **Attachments returnable before justices.** Justices of the peace have power to issue attachments, returnable before themselves, where the amount claimed does not exceed one hundred dollars, for the enforcement of the debts or demands, and in the cases mentioned in sections 2929 (3252) and 2930 (3253) of this Code.

Lowry v. Stowe, 7 Port. 483; Johnson v. Hale, 3 Stew. & Port. 331; Cook v. Walthall, 20 Ala. 334; Langdon v. Raiford, Ib. 532; Taliaferro v. Lane, 23 Ala. 369; Griffin v. Appleby, 69 Ala. 410.

3335 (3683). **What provisions applicable.**—The provisions of this Code regulating the issue and levy of attachments, original or ancillary, and of garnishments, and the trial of, and proceedings in suits commenced by attachments, or in aid of which attachments or garnishments are issued in the circuit court, not contrary to the provisions of this chapter, and so far as applicable, shall apply to, and govern in like cases triable before justices of the peace.

3336 (3684). **Form of attachment.**—The form of such attachment must be, in substance, as follows:

"State of Alabama, ——— county. } To any lawful officer of said county:

"Whereas ——— ——— (or ——— ———, as the authorized agent or attorney of ——— ———), hath complained on oath to me, ——— ———, a justice of the peace for the county aforesaid, that ——— ——— is (or will be) justly indebted to him in the sum of —— dollars, and has made affidavit and given bond as required by law: You are hereby commanded to attach so much of the estate of ——— ——— as will be of value sufficient to satisfy the complaint and costs, and such estate, unless replevied, so to secure that the same may be liable to further proceedings thereon, to be had before me on the —— day of ———, 18—, at ———, when and where you must make re-

turn how you have executed this writ. Witness my hand this —— day of ———, 18—.

"——— ———, Justice of the Peace."

Lowry v. Stowe, 7 Port. 483.

3337 (3685). **Notice of levy on real estate.**—When such attachment is levied on real estate, notice must be given as provided for by section 3360 (3639), and the papers, after judgment against the defendant, must be returned to the clerk of the circuit court by the justice for an order of sale, as in other cases of levy on lands by constables.

3338 (3686). **What cannot be attached.**—Neither money in the hands of a sheriff, or other executive officer of the court, nor a debt or demand in any court of record, can be attached under an attachment or other process issued by, and returnable before a justice of the peace.

3339 (3687). **Sale of property attached before judgment.** Property which is perishable, or such that the expense of keeping it will materially impair its value, must be sold by order of the justice, when the debt upon which the attachment is sued out is not due, or when the defendant is a non-resident, or when from any cause the judgment or sale is postponed, so that the property attached will materially deteriorate in value, unless the same is replevied; and the proceeds of such sale must be retained in the hands of the justice to abide the judgment.

3340 (3688). **Answer of garnishee; evidence on appeal.** The garnishee must answer on oath in writing, or his statement must be reduced to writing by the justice; and if an appeal is taken, the answer made before the justice is evidence against the garnishee in the circuit court.

3341 (3689). **When property replevied to be delivered; execution on forfeited bond.**—Property replevied must be delivered to the constable within ten days after judgment against the defendant, unless an appeal is prosecuted from the judgment; and, on failure thereof, the constable must indorse the bond forfeited, upon which execution must issue against the obligors therein.

Cummins v. Gray, 4 Stew. & Port. 397.

3342 (3690). **Contest of garnishee's answer and collateral issues tried without jury.**—When the answer of a garnishee it contested, or when any collateral issue arises from a contest between a transferee or claimant of the debt attached and the plaintiff, the question must be decided by the justice, without the intervention of a jury.

3343 (3691). **Execution for balance of judgment unsatisfied.**—When the property attached, or in the hands of the garnishee, is not sufficient to satisfy the judgment, execution may issue for the residue, and be levied on any other property of the defendant subject to levy and sale.

3344 (3641). **Sale of land when garnishee answers indebtedness for purchase-money.**—If the garnishee answers an indebtedness to the defendant on account of the purchase-money of land, and the same is condemned in his hands to the payment of the plaintiff's judgment against the defendant, and execution against the garnishee is returned "no property found," or is not fully satisfied, the plaintiff may move in the

circuit court of the county for an order for the sale of such land, in the same manner as lands levied on by a constable are sold, and in the same manner such order and sale shall also be granted and conducted; and in such case the justice of the peace shall send up to the circuit court the papers in the cause, as in other cases of levy on lands by a constable.

CHAPTER 4.

EXECUTIONS.

3345 (3627). **Issue and return of executions.**—After the lapse of five days from rendition of judgment, if an appeal is not taken, the justice must, unless otherwise directed, issue a writ of fieri facias for the satisfaction of the judgment, which must be signed by him, dated on the day it was issued, and made returnable before him, not less than twenty, nor more than sixty days from the date of its issue; and alias writs shall be made returnable in like manner. As amended, Jan. 30, 1885, p. 104.

Bobo v. Thompson, 3 Stew. & Port. 385; Kyle v. Evans, 3 Ala. 481; Wofford v. Robinson, 7 Ala. 489; McElhaney v. Flynn, 23 Ala. 819; Jones v. Calloway, 56 Ala. 46; Sandlin v. Anderson, 76 Ala. 403.

3346 (3628). **Form of execution.**—The writ must be, in substance, as follows:

"State of Alabama, } To any lawful officer of the county of
——— county. } ———:

"You are hereby commanded, of the goods and chattels of ——— ———, you make the sum of——— dollars, which ——— ——— recovered before me of him, on the —— day of ———, 18—, besides ——— dollars, his costs; and make return to me on the —— day of ——— next, at ———, in your county, how yon have executed this writ.

"Witness my hand, this, —— day of ———, 18—.

"——— ———, Justice of the Peace."

3347 (3629). **When may be issued immediately.**—If the plaintiff, his agent, or attorney, make oath in writing before the justice, that the plaintiff is in danger of losing the fruit of his judgment by delay, the justice must issue execution thereon immediately.

3348 (3632). **When execution may be stayed.**—The defendant may, at any time before the issue of execution, stay the issue thereof for thirty days, if the judgment is for less than twenty dollars, or for sixty days, if for more than twenty dollars, by executing an undertaking in writing, payable to the plaintiff, in double the amount of the judgment, with sureties to be approved by the justice, and conditioned to pay the judgment at the expiration of the stay; and if not paid, execution may issue therefor against the defendant and the sureties on such undertaking.

3349 (3647). **Execution to another county.**—When a defendant in judgment removes to another county, or has property in any county other than that in which the judgment was rendered, execution on such judgment may be issued by the justice,

and directed to any constable of such county, which must be certified by the judge of probate of the county in which the judgment was rendered, or by a justice of the county to which it is sent, who has knowledge of the handwriting of the justice issuing it.

Burgess v. Sugg, 2 Stew. & Port. 341; Jordan v. Mead, 12 Ala. 247; Street v. McClerkin, 77 Ala. 580.

3350 (3648). **By whom executed.**—Such execution may be executed by any constable of the county to which it is sent, and must be by him returned to the justice issuing it, as in other cases.

3351 (3649). **Lien of execution.**—Executions issued by justices are liens on the property of the defendant on which they are levied from the time of the levy.

3352 (3650). **Order of payment of several executions against same defendant.**—If more than one execution comes to the hands of the constable against the same defendant at different times, the first received by him must be first satisfied; and if they come to his hands at the same time, and all cannot be fully satisfied, each must receive a ratable proportion of the funds; and it is the duty of the constable to indorse on every execution received by him the true date of the receipt thereof.

3353 (3652). **When indemnity may be required.**—When a reasonable doubt exists as to the title of the defendant to personal property, the constable may refuse to levy, or may release a levy already made, unless indemnified by the plaintiff; and if there are more than one execution in his hands, the plaintiff in the execution first received has the prior right to give such indemnity; and upon his refusal, the plaintiff in the execution next received may give the indemnity, and have the property sold for his benefit.

Murray v. Ezell, 3 Ala. 148.

3354 (3643). **Forthcoming bond; effect of.**—When a levy is made on personal property, the defendant may retain the possession thereof until the day of sale, upon executing a forthcoming bond, payable to the plaintiff, in double the amount of the judgment, with sufficient sureties, to be approved by the constable, with condition to have the property forthcoming at twelve o'clock of the day, and at the place appointed for the sale.

3355 (3644). **Execution issues on forfeiture of bond; no stay allowed.**—If the property is not delivered at such time and place, the constable must return the bond forfeited to the justice, who must thereupon, without delay, issue execution thereon for the amount of the judgment and costs against the defendant and the sureties on the bond, upon which no further stay of execution must be taken.

3356 (3645). **Proceedings on forfeited bond, when execution issued from another county.**—If property is levied on by a constable under an execution from another county, and the property is not delivered on the day of sale according to the forthcoming bond, the constable must return the bond forfeited to any justice of his county, together with a copy of the execution, who must proceed thereon in the same manner as if the judgment had been rendered by him; and the constable must

then return the execution to the justice who issued it, with an indorsement showing the levy, and the execution and forfeiture of the bond.

3357 (3646). **Defects in form do not affect bond.**—Any undertaking entered into by the parties, with the consent of the justice or constable, as a stay of execution, or forthcoming bond, and which has the effect to stay execution, or continue the property levied on in the possession of the defendant, must be deemed sufficient, though defective in form.

3358 (3637). **Time and place of sale of personal property.** Personal property, levied on under an execution issued by a justice of the peace, must be sold at the residence of the defendant, or at such other place within the precinct as may be most for the benefit of the parties, between the hours of eleven in the morning and four in the afternoon.

Jones v. Davis, 2 Ala. 730; Street v. McClerkin, 77 Ala. 580.

3359 (3638). **Levy on land; when made, and proceedings thereunder.**—If the defendant has no personal property known to the constable, or if it is insufficient to satisfy the execution, he must indorse the fact upon the execution, and may then levy on land of the defendant subject to execution, describing it in his levy, and make return thereof to the justice, who shall thereupon transmit all the papers in the cause to the next circuit court, or court having like jurisdiction.

McDaniel v. Moody, 3 Stew. 314; Weir v. Clayton, 19 Ala. 132; Brown v. Higginbottom, Ib. 207; Langdon v. Raiford, 20 Ala. 532; Ellis v. White, 25 Ala. 540; Sherry v. Brown, 66 Ala. 51; Dickerson v. Carroll, 76 Ala. 377; Toenes v. Moog, 78 Ala. 558.

3360 (3639). **Notice of levy on land.**—If the defendant, on whose land the levy is made, is a resident of, and within the county, personal notice of such levy must be given him; otherwise, by posting a notice in a conspicuous place on the land levied on.

3361 (3640). **Sale of land ordered on motion.**—If the proceedings before the justice are regular, and establish a judgment against the defendant, issue of execution and levy on land for want of personal property, and notice thereof, and no sufficient objection is made, the court must, on motion of the plaintiff, direct a sale of the land for the satisfaction of the judgment.

3362 (3642). **Record and writ for sale of land.**—The clerk of the court in which the motion is made must record all the proceedings before the justice, together with the return of the constable, the motion of the plaintiff and the order of the court thereon, and must issue a writ directing the sheriff to sell the land for the satisfaction of the judgment.

3363 (3658). **Issue of alias executions without revival.** When an execution has been issued within six months after the rendition of judgment, and has not been returned satisfied, another execution may be issued thereon at any time within three years thereafter, without a revival of the judgment.

Henderson v. Gandy, 11 Ala. 431.

3364 (3659). **When scire facias necessary; bar to revival of judgment.**—When execution has not been thus sued out, no execution can issue until the defendant is notified to appear at a time and place designated by the justice, and show cause why

the plaintiff should not have execution of his judgment; but no judgment can be revived after the lapse of five years from the rendition thereof, or from the issue of the last execution thereon.

CHAPTER 5.

TRIAL OF RIGHT OF PROPERTY.

3365 (3676). **Trial of right of property; how instituted.** When an attachment or execution is levied on personal property claimed by any person not a party to the writ, he may try the right to such property, before a sale thereof, by making an affidavit, which may be administered by the officer levying the process, that he has a just title thereto, and executing bond in double the value of the property so levied on, payable to the plaintiff, with sufficient sureties, to be approved by the officer making the levy, with condition to have the property forthcoming for the satisfaction of the plaintiff's judgment, if it be found liable therefor, and also for the payment of such costs and damages as may be recovered for putting in the claim for delay; and thereupon the property must be delivered to the possession of the claimant.

Murray v. Ezell, 3 Ala. 148; Taliaferro v. Lane, 23 Ala. 369; Derrett v. Alexander, 25 Ala. 268; Floyd v. Morrow, 26 Ala. 353; Walker v. Ivey, 74 Ala. 475.

3366 (3677). **Bond and affidavit returned; issue and burden of proof.**—The affidavit and bond must, without delay, be returned to the justice who issued the process, when an issue must be made up between the plaintiff in the process and the claimant, in which the former must be required to allege that the property levied on is the property of the defendant in the process, and liable to its satisfaction; and upon such issue the burden of proof is on the plaintiff in the process.

3367 (3680). **Assessment of value of property, and damages for delay.**—The justice, if he finds for the plaintiff, must ascertain the value of each article of the property separately, as far as practicable, and if he is of the opinion that the claim was put in for delay, he must also assess the plaintiff's damages, not exceeding fifteen per cent. on the amount of the plaintiff's demand.

Mundine v. Perry, 2 Stew. & Port. 130.

3368. Forfeiture of claim bond.—If judgment be rendered against the claimant, and he fail to deliver the property to the sheriff or constable levying the process within ten days thereafter, such officer must indorse the bond forfeited, and return the same to the justice; and thereupon, if the property was levied on under execution, or, if levied on under an attachment, after judgment in favor of the plaintiff against the defendant in attachment, the justice must issue an execution against all the obligors in the bond for the amount of the judgment against the defendant, if that is less than the value of the property as assessed by the justice, or for the amount of such assessed value, if less than the amount of the judgment; also for the

damages, if any were assessed, and the costs of the trial of the right of property.

3369. Provisions of Code made applicable.—The provisions of sections 3015 (3347), 3016 (3348), 3017 (3349) of this Code shall also be applicable to trials of the right of property before justices of the peace.

CHAPTER 6.

TRIAL BY JURY.

3370 (3619). **Appeal to jury, how taken; subpœnas for witnesses.**—Any party, dissatisfied with the judgment rendered by a justice of the peace, may, within five days thereafter, appeal to a jury, on giving bond with sufficient sureties, to be approved by the justice, in double the amount of the judgment and costs, with condition for the payment of such judgment as may be rendered against him; and such justice, his successor in office, or any other justice of the peace in the county, may issue subpœnas for all witnesses that the parties may desire.

E. T., V. & G. R. R. Co. v. Hughes, 76 Ala. 590.

3371 (3620). **How appeal tried, before whom, and its effect.**—Such appeal must be tried before any one or more of the justices of the peace in the precinct in which the cause originated, by five jurors, to be drawn, sworn and impaneled as hereinafter directed, whose verdict shall be final and conclusive between the parties, unless removed by certiorari or appeal to the next term of the circuit court, or other court of like jurisdiction, of the county; and such jury must be impaneled and sworn, and the trial conducted, and the evidence admitted, in the same manner as in the circuit court; and such justice must enter up judgment on his docket in accordance with the verdict of the jury, and issue execution thereon as in other cases before justices of the peace.

3372 (3621). **Mode of drawing juries.**—The mode of drawing juries under the preceding section must be as follows: The justices of the peace in each precinct must, once in two years, make a list of all persons liable to serve on juries in the circuit court, who reside in the precinct, and must write the name of each person so liable on a separate piece of paper, which must be deposited in a box marked number one; and must draw therefrom not less than five, nor more than seven of the names so deposited, from time to time, as may be necessary to try the causes pending in their courts, which names must be entered in the justice's docket, and deposited in a box marked number two; and after all the names are drawn from number one, they must commence drawing from number two, and so on alternately.

3373 (3622). **Penalty on jurors for failure to attend; how deficiency supplied.**—The justices or justice of each precinct may draw a jury at any time within five days after judgment is rendered, should an appeal be taken within that period; and any person so drawn and summoned by a constable three days before court, neglecting to attend, shall be subject to the same fines and

forfeitures, and be proceeded against in the same manner as witnesses are for failing to attend justices' courts; and the constable, by direction of the justice, must fill and complete such jury from the by-standers in case of deficiency of jurors; but there must be at least three of the original panel on such jury.

3374 (3623). **Pay of jurors.**—Such jurors shall be entitled to receive fifty cents each for their attendance, which must be taxed in the bill of costs.

3375 (3624). **Jurors, how summoned.**—The justice must issue a venire facias for the jury so drawn, returnable to the next regular term of his court, and the constable must, at least three days before court, summon the jurors so drawn to attend such court.

3376 (3625). **Oath of jurors.**—The following oath must be administered to the jury by the justice of the peace, before any cause is submitted for their consideration: "You, and each of you, do solemnly swear that you will well and truly try all issues submitted to you by the court during the day, and a true verdict render according to the law and the testimony; so help you God."

3377 (3626). **Jury trials only at regular terms; exception.** The jury trial, within the meaning of this chapter, must be had on a regular court day, as provided for in section 3300 (3602) of this Code, unless it becomes necessary to adjourn such court to a stated time, not beyond ten days, in order to dispose of the causes pending therein.

CHAPTER 7.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

3378 (3694). **Cognizable before justice of the peace.**—The forcible entry upon and detainer, or the unlawful detainer of lands, tenements and hereditaments, is cognizable before a justice of peace of the county in which the offense is committed.

Not unconstitutional.—Ward v. Lewis, 1 Stew. 26; Beck v. Glenn, 69 Ala. 121.

3379 (3695). **Courts for such trials always open.**—Courts having jurisdiction under this chapter must be held open at all times, for the consideration and determination of questions arising under this chapter, and judgments had thereon without delay.

As amended, Feb. 13, 1879, p. 49.

3380 (3696). **Forcible entry and detainer defined.**—A forcible entry and detainer is, where one, by force or strong hand, or by exciting fear or terror, enters upon and detains lands or tenements in the possession of another; as by breaking open doors, windows, or any other part of a house, whether any person be within or not; by threats of violence to the party in possession, or by such words or actions as have a tendency to excite fear or apprehension of danger; by putting out of doors, or removing the goods or chattels of the party in possession; or by entering peaceably, and then, by unlawful refusal, or by force or threats, turning or keeping the party out of possession.

McDonald v. Gayle, Minor, 98; Ward v. Lewis, 1 Stew. 26; Grice v. Ferguson, Ib. 36; Lecatt v. Stewart, 2 Stew. 474; Botts v. Armstrong, 8 Port. 57; Bliss v.

Winston, 1 Ala. 344; Cunningham v. Green, 3 Ala. 127; Wright v. Lyle, 4 Ala. 112; Clark v. Stringfellow, Ib. 353; Huffaker v. Boring, 8 Ala. 87; McKeen v. Nelms, 9 Ala. 507; Walters v. Rogers, Ib. 834; Horsefield v. Adams, 10 Ala. 9; Mattock v. Thompson, 18 Ala. 600; McGonegal v. Walker, 23 Ala. 361; House v. Camp, 32 Ala. 542; Ladd v. Dubroca, 45 Ala. 421; Welden v. Schlosser, 74 Ala. 355; Clements v. Hays, 76 Ala. 281; Brady v. Huff, 75 Ala. 80; Wray v. Taylor, 56 Ala. 188.

3381 (3697). **Unlawful detainer defined.**—An unlawful detainer is, where one who has lawfully entered into possession of lands or tenements, after the termination of his possessory interest, refuses, on demand in writing, to deliver the possession thereof to any one lawfully entitled thereto, his agent, or attorney.

Kennedy v. Hitchcock, 4 Port. 230; Barr v. White, 2 Port. 342; Stinson v. Gossett, 4 Ala. 170; Snoddy v. Watt, 9 Ala. 609; Mounger v. Burks, 17 Ala. 48; Russell v. Deplous, 25 Ala. 514; s. c., 29 Ala. 308; Dumas v. Hunter, 30 Ala. 75; Dwine v. Brown, 35 Ala. 596; Rainey v. Capp, 22 Ala 289; Waugh v. Ridgeway, 42 Ala. 368; Spear v. Lomax, Ib. 576; Hightower v. Fitzpatrick, Ib. 597; Bates v. Ridgeway, 48 Ala. 611; Ware v. Warwick, Ib. 295; Womack v. Powers, 50 Ala. 5; Ridgeway v. Waugh, 51 Ala. 423; Beck v. Glenn, 69 Ala. 121; Brown v. Beatty, 76 Ala. 250; Houston v. Farriss, 71 Ala. 570; Hurst v. Thompson, 68 Ala. 560.

3382 (3698). **What estates in land included.**—The two preceding sections extend to, and comprehend terms for years, and all estates, whether freehold or less than freehold.

3383 (3699). **Issue and form of notice upon complaint filed.** Upon complaint being made, the justice of the peace must issue a notice to the party against whom the complaint is made, to the following effect:

"The State of Alabama, ——— county. } To ——— ———:

"You are hereby commanded to be and appear before me, at ———, on the —— day of ———, 18—, to answer to, and make defense against a complaint exhibited to me against you by ——— ———, for a forcible entry and detainer (or for an unlawful detainer, as the case may be).

"Witness my hand, this —— day of ———, 18—.

"——— ———, Justice of the Peace."

Sufficiency of complaint.—Ward v. Lewis, 1 Stew. 26; Mead v. Daniel, 2 Port. 86; Bell v. Killcrease, 11 Ala. 685; Mattock v. Thompson, 18 Ala. 600; House v. Camp, 32 Ala. 541; Ferguson v. Carter, 40 Ala. 607; Townsend v. Van Aspen, 38 Ala. 572; Jonsen v. Nabring, 50 Ala. 395; Spear v. Lomax, 42 Ala. 576; Hightower v. Fitzpatrick, Ib. 597. **When a misjoinder of plaintiffs.**—Ware v. Warwick, 48 Ala. 295. **Forcible entry and unlawful detainer may be joined.**—Littleton v. Clayton, 77 Ala. 571.

3384 (3700). **Time and mode of serving notice.**—The notice must be served on the defendant at least six days before the return day of the process, and may be served on him anywhere within the state. The return of the service thereof by any sheriff or constable of the state is sufficient, or proof of the fact may be made before the justice. It is sufficient to leave a copy thereof at his usual place of abode.

3385 (3714). **Before whom tried.**—The complaints provided for in this chapter must be exhibited to, and be tried by a justice of the peace for the precinct in which the lands or tenements are situated; if in a city or corporate town, before the mayor, intendant, or any justice of the peace thereof; and if the office is vacated, or such justice, mayor, or intendant, is disqualified, from any cause, from sitting, then by the justice of some adjoining precinct.

3386 (3701). **Issue and trial.**—If the parties appear, an issue must be made between them upon the complaint; but if the defendant, having been duly cited, does not appear, or appearing declines to plead, the cause proceeds as if the defendant had pleaded not guilty; or, for good cause, the trial may be postponed not more than fifteen days, at the cost of the applicant.

3387 (3702). **If plaintiff succeeds, writ of restitution issued; costs.**—If the justice determine in favor of the plaintiff, he must record the decision, and render judgment with costs, upon which he must issue a writ of execution, commanding the sheriff to restore the plaintiff to the possession of his lands and tenements according to the complaint, and to levy and sell a sufficiency of the defendant's goods and chattels, lands and tenements to satisfy the costs of the proceedings.

Conclusiveness of judgment.—Norwood v. Kirby, 70 Ala. 397; Brady v. Huff, 75 Ala. 80.

3388 (3703). **If plaintiff fails, judgment entered against him for costs; execution.**—If the justice determines in favor of the defendant, judgment must be rendered in his favor for the costs, upon which an execution may issue as in other cases; and in either case, the items composing the bill of costs must be stated at the foot of the execution.

3389 (3704). **Title not in issue.**—The estate or merits of the title cannot be inquired into on the trial of any complaint exhibited under this chapter.

Cunningham v. Green, 3 Ala. 127; Clark v. Stringfellow, 4 Ala. 353; Dumas v. Hunter, 25 Ala. 711; Milner v. Wilson, 45 Ala. 478; Houston v. Farriss, 71 Ala. 570; Townsend v. Van Aspen, 38 Ala. 572; Welden v. Schlosser, 74 Ala. 355.

3390 (3705). **Statute of limitations.**—The uninterrupted occupation of the premises in controversy by the defendant, for the space of three entire years preceding the exhibition of the complaint, is, if the estate of the defendant is not determined, a bar to any proceeding under this chapter.

Ferguson v. Carter, 40 Ala. 607; Hightower v. Fitzpatrick, 42 Ala. 597; Posey v. Pressley, 60 Ala. 243; King v. Bolling, 77 Ala. 594.

3391 (3709). **Damages for detainer after expiration of term of lease.**—Any person who, having entered into the possession of lands and tenements under a contract of lease, forcibly or unlawfully retains the possession thereof after the expiration of his term, or refuses to surrender the same on the written demand of the lessor, his agent, or attorney, or legal representative, is liable for double the amount of the annual rent agreed to be paid under such contract, and for such other special damages as may be thereby sustained by the party thus unlawfully kept out of possession, to be recovered as now provided by law in actions of unlawful detainer, or by an action at law for damages.

Spear v. Lomax, 42 Ala. 576; Lomax v. Spear, 51 Ala. 532; Hurst v. Thompson, 68 Ala. 560.

3392 (3708). **Proceedings no bar to other remedies.**—No proceeding had under this chapter, or judgment rendered, bars or prevents the party injured from prosecuting an action of trespass, or other action, against the aggressor or party offending.

Belshaw v. Moses, 49 Ala. 283; Abrams v. Watson, 59 Ala. 530.

3393 (3706). **Subpœnas and depositions.**—The justice be-

fore whom the complaint is exhibited must issue subpœnas for witnesses, at the request of either party, which may be served either by the sheriff, or by a constable; and either party may also take the testimony of witnesses by deposition, as in other cases before justices of the peace.

3394 (3707). **Penalty for failure to execute process.**—Any sheriff or constable, neglecting or refusing to execute any process placed in his hands by a justice of the peace, in virtue of the authority conferred by this chapter, forfeits to the party aggrieved two hundred dollars, to be recovered by action in the circuit court, or court of like jurisdiction.

3395 (3715). **Fine against defaulting witness.**—Any witness, duly subpœnaed, and failing to attend, or refusing to testify, may be fined by the justice of the peace not exceeding one hundred dollars, for the use of the county, for which he may issue execution directed to the constable.

3396 (3716). **Notice to witness before judgment is made absolute.**—The judgment specified in the preceding section must not be made absolute, until ten days after service of a written notice on such witness, informing him of the rendition of such judgment.

3397 (3717). **Fees of witnesses, sheriffs and constables.** In proceedings under this chapter, the following fees shall be allowed: To witnesses, the same fees as are allowed by law in the circuit court; to the sheriffs, for serving summons and return, one dollar; for executing writ of restitution, two dollars; for making money on execution, serving subpœnas, etc., the same fees as in cases in the circuit court; to the constables, the same fees as in other cases.

CHAPTER 8.

APPEALS AND PROCEEDINGS THEREON.

3398 (3654, 3710). **Appeals from judgments before justices.** Any party may appeal from any judgment rendered against him before a justice of the peace to the circuit court, or court of like jurisdiction, upon complying with the provisions of this chapter, at any time within five days after the rendition thereof, except in cases of forcible entry or unlawful detainer, wherein he may appeal at any time within ten days after the rendition of the judgment.

What may be removed by certiorari.—Gilliland v. Ware, 4 Ala. 414; Wyatt v. Judge, 7 Port. 37. **What judgment not sufficient to support an appeal.**—Little v. Fitts, 33 Ala. 343. **Certiorari is not grantable,** to determine a question on the payment of an execution.—Bobo v. Thompson, 3 Stew. & Port. 385. **Certiorari is merely a means of removing case to circuit court,** and may be dispensed with, without affecting the jurisdiction of the court.—Hatter v. Eastland, 22 Ala. 689. **When certiorari should not be dismissed.**—Washington v. Parker, 60 Ala. 447; Grantham v. Payne, 77 Ala. 584; Wright v. Gray, 20 Ala. 363; Casey v. Briant, 1 Stew. & Port. 51. **When barred by lapse of time.**—Enis v. Ross, 19 Ala. 239; Mason v. Moore, 12 Ala. 578; Grantham v. Payne, 77 Ala. 584. **Should not be granted,** when petition does not show any reason why appeal was not taken.—Wright v. Gray, 20 Ala. 363. **When supreme court will not presume appeal was taken too late,** merely from date of bond.—Johnson v. Hale, 3 Stew. & Port. 331. **When error to dismiss appeal,** though bond was given after lapse of five days from date of

judgment.—Averrett v. Horn, 19 Ala. 803. **One of several defendants may prosecute an appeal.**—Craig v. Atwood, 1 Stew. & Port. 86. **When defect in certiorari waived.**—Hatter v. Eastland, 22 Ala. 689.

3399 (3654). **Bond for appeal or certiorari.**—Unless otherwise provided, no cause can be carried from a justice's court to the circuit or other court of like jurisdiction by appeal or certiorari, unless the party applying for such appeal or certiorari first executes bond, with sufficient sureties, payable to the adverse party, with condition to pay such judgment as may be rendered against him by the court to which the cause is sought to be removed.

When bond insufficient.—Smith v. Hearne, 2 Stew. & Port. 81; Davis v. Calhoun, 24 Ala. 437. **When bond will not sustain judgment against sureties.**—Quinn v. Adair, 4 Ala. 315. **Bond payable to a party who is dead is void.**—Frierson v. Blakesley, 3 Stew. 267. **What substantially complies with statute.**—Lightfoot v. Strahan, 7 Ala. 444; Windham v. Coats, 8 Ala. 285. **Sureties not liable beyond penalty.**—Windham v. Coats, 8 Ala. 285; Witherington v. Brantley, 18 Ala. 197. **Appeal should not be dismissed for defect in bond,** unless appellant fails to execute a perfect bond.—Carter v. Pickard, 11 Ala. 673; Henderson v. Plumb, 18 Ala. 74; Appleton v. Turrentine, 19 Ala. 706.

3400. Amount of bond for appeal or certiorari.—If such appeal or certiorari is applied for by a defendant, claimant, garnishee, or any other party against whom a judgment for the payment of money has been rendered, such bond shall be in double the amount of the judgment rendered against him, including costs; in all other cases, in such amount as may be prescribed, in cases of appeal, by the justice, and, in case of certiorari, by the officer granting the same.

3401 (3711). **When writ of restitution in unlawful detainer, etc., not suspended.**—In cases of forcible entry or unlawful detainer, an appeal does not prevent the issue of a writ of restitution, unless the defendant also executes bond, with sufficient sureties, payable to the plaintiff, in the sum of twice the yearly value of the rent of the premises, to be ascertained by the justice, with condition to pay the plaintiff all such damages as he may sustain by the prosecution of the appeal.

Ex parte Floyd, 40 Ala. 116; Spear v. Lomax, 42 Ala. 577; Beck v. Glenn, 69 Ala. 121; Robbins v. Battle House Co., 74 Ala. 499.

As amended, Feb. 12, 1885, p. 113.

3402 (3655). **Papers and statement of the case to be returned to the clerk.**—When an appeal is taken, the justice must return all the original papers of the cause, together with a statement, signed by him, of the case and the judgment rendered by him, to the clerk of the court to which the appeal was taken, within ten days after the taking of the appeal.

Larcher v. Scott, 2 Ala. 40; Wolfe v. Parham, 18 Ala 441.

3403 (3657). **Notice of appeal to be served on appellee.** The justice must also issue a notice to the appellee that such appeal has been taken, which must be executed by personal service on him, his agent, or attorney, five days before the return term of the appeal, and must be returned by the constable to the clerk of the court to which the appeal was taken, on or before the second day of the term.

Bettis v. Nicholson, 1 Stew. 349; Goss v. Davis, 21 Ala. 479; Martin v. Higgins, 23 Ala. 775; Kape v. Gammell, 50 Ala. 492.

3404 (3654, 3126). **Defects in bond may be cured.**—Whenever it is made to appear to the appellate court that the appeal or certiorari is defective, or the security is insufficient, such

court may require a new bond, or new or additional sureties, within such time as the court may prescribe; and if not given, the court may dismiss the suit or appeal, or render judgment, as the circumstances may require; but no appeal or certiorari must be dismissed for any defect in such bond, if the party is willing to execute a sufficient bond.

See citations to section 3399.

3405 (3121, 3127). **When and how cases on appeal shall be tried.**—Cases brought by appeal or certiorari from judgments of justices of the peace must be tried at the first term thereafter, if the five days' notice of the appeal or certiorari, required by law, has been given to the appellee, his agent, or attorney, unless good cause be shown for a continuance; but if such notice has not been given, the case must be continued until the next term; and all such cases must be tried de novo and according to equity and justice, without regard to any defect in the summons, or other process, or proceedings before the justice.

Trial de novo, etc.—Solomon v. Ross, 49 Ala. 198; Brooks v. Carter, 36 Ala. 682; S. & N. R. R. Co. v. Seale, 59 Ala. 608; W. U. Tel. Co. v. Meyer, 61 Ala. 158; Abraham v. Alford, 64 Ala. 281; Abrams v. Johnson, 65 Ala. 465; Burns v. Howard, 68 Ala. 352; Harsh v. Heflin, 76 Ala. 499. **Amendment on appeal.**—Moffet v. Wooldridge, 3 Stew. 322; Taylor v. Acre, 8 Ala. 491; Mooney v. Ivey, Ib. 810; Peck v. Colby, 31 Ala. 252; Couch v. Atkinson, 32 Ala. 633; Davis Ave. R. R. Co. v. Mallon, 57 Ala. 168; Schuessler v. Wilson, 56 Ala. 516; House v. Lassiter, 49 Ala. 307; S. & N. R. R. Co. v. Small, 70 Ala. 499; Littleton v. Clayton, 77 Ala. 571. **Pleading and practice on appeal.**—Wilson v. Collins, 9 Ala. 127; Duncan v. Richardson, 34 Ala. 117; Van Aspen v. Townsend, 36 Ala. 582; Noles v. Marables, 50 Ala. 366; Glaze v. Blake, 56 Ala. 379; Heyman v. McBerney, 66 Ala. 511; Elmore v. Simon, 67 Ala. 528; Littleton v. Clayton, 77 Ala. 571; S. & N. R. R. Co. v. Pilgreen, 62 Ala. 305; Gould v. Meyer, 36 Ala. 565; Case v. Moore, 21 Ala. 758.

3406 (3693). **Attachments; what defects cured by appeal.** No attachment can be quashed or dismissed in the appellate court for any defect in the affidavit, attachment, or bond, or for want of bond, if the plaintiff will execute a sufficient bond; and no objection can be made in that court to the regularity of the proceedings which was not made before the justice of the peace.

Slaton v. Apperson, 15 Ala. 721; Staggers v. Washington, 56 Ala. 225.

3407 (3122). **When case tried without a jury.**—When the sum claimed does not exceed twenty dollars, the cause must be tried by the court without the intervention of a jury; but when it exceeds twenty dollars, an issue must be made up, under the direction of the court, and the cause tried by a jury.

Pike v. Bright, 29 Ala. 332; Abrams v. Johnson, 65 Ala. 470; Dargan v. Harris, 68 Ala. 144.

3408 (3123). **Damages assessed, if appeal taken for delay.** If it appear that the appeal or certiorari was taken for delay merely, fifteen per cent. damages may be assessed.

Shorter v. Hightower, 48 Ala. 526; Crump v. Battles, 49 Ala. 223.

3409 (3124). **Costs; how taxed.**—If the defendant appeals or obtains a writ of certiorari, and the judgment of the appellate court is for less than the judgment of the justice, the court may tax either party with the costs, or both parties with any portion thereof; and if the plaintiff appeals, or obtains a writ of certiorari, and does not recover more than the amount

for which the justice rendered judgment, he must be taxed with the costs.

Beason v. Riddle, 11 Ala. 743.

3410 (3125). **On affirmance, judgment rendered also against sureties.**—When, on appeal or certiorari, the judgment is affirmed, judgment must be rendered by the court against the sureties as well as the principal, which must include the costs of the inferior and appellate courts.

See citations to section 3399.

3411 (3712, 3713). **Judgment in forcible entry or unlawful detainer; writ of restitution.**—In cases of forcible entry or unlawful detainer, the judgment, if against the appellant, must be rendered in the appellate court against him and the sureties on the appeal or certiorari bond, including the costs in the inferior and appellate courts; and if the appeal or certiorari was sued out by the defendant, and a supersedeas bond was executed, a writ of restitution must be awarded, and, on motion of the plaintiff, judgment must also be rendered against the defendant and the sureties on his supersedeas bond for the value of the rent of the premises pending the appeal.

See citations to section 3401.

Feb. 5, 1881, p. 64, sec. 1.

3412. Procedendo when justice vacates office pending appeal.—When a cause is removed from the court of a justice of the peace, or notary public having like powers, to the circuit or other court of like jurisdiction, by appeal or certiorari, and while the cause is pending in such court, the justice or notary should die, or otherwise vacate his office, leaving no qualified successor, and in the prosecution of the cause, it should become necessary, by a dismissal of the appeal or certiorari, for a writ of procedendo to issue, it shall be the duty of the court, upon motion, to direct such writ to issue to any justice of the peace, or notary public having like powers, in the county.

Ib. sec. 2.

3413. How judgment in such case established, when docket has been lost.—If, in such case, the docket of the justice or notary has been lost or destroyed, the transcript of the same on file in the appellate court, or a certified copy thereof, shall be sufficient evidence upon which to establish the judgment before any justice or notary to whom the appellate court may direct the writ of procedendo to issue.

TITLE IV.

PROCEEDINGS IN CHANCERY.

CHAPTER 1.—Cases of which chancery courts take cognizance; bill, answer, replication and demurrer.
2.—Amendments, exceptions, filing of papers, and serving notices; making answer a cross bill, revivor of suit by a defendant.
3.—Evidence in chancery.
4.—Reference to the register.
5.—Decrees pro confesso, and final decrees without personal service.
6.—Bills of review, ne exeat, equitable attachments, and writs of seizure.
7.—Injunctions; appointment of receivers.
8.—Correction of errors in proceedings in court of probate.
9.—Creditors' bills.
10.—Trusts and trustees.
11.—Issues out of chancery.
12.—Call of the docket; hearing of causes; rendition, lien, effect and enforcement of decrees.

CHAPTER 1.

CASES OF WHICH CHANCERY COURTS TAKE COGNIZANCE; BILL, ANSWER, REPLICATION AND DEMURRER.

3414 (3753). **Jurisdiction of courts of chancery.**—Courts of chancery must take cognizance of cases in equity,—

1. When the defendants reside in this state.

2. Against non-residents, when the object of the suit concerns an estate of, lien or charge upon lands, or the disposition thereof, or any interest in, title to, or incumbrance on personal property within this state, or where the cause of action arose, or the act on which the suit is founded, was to have been performed in this state.

3. In such other cases as such courts are by law required to take jurisdiction.

Holman v. Bank, 12 Ala. 369; Glover v. Glover, 16 Ala. 440; Sayre v. Elyton Land Co., 73 Ala. 86; Waldron v. Simmons, 28 Ala. 629.

3415 (3754). **Joint demand may be prosecuted against one defendant.**—When the plaintiff has a joint demand, he may proceed against one or more of the parties thereto, without joining the others.

Moore v. Armstrong, 9 Port. 697; Teague v. Corbitt, 57 Ala. 529; Hailey v. Boyd, 64 Ala. 399; Fulgham v. Herstein, 77 Ala. 496.

3416 (3755). **The state may bring suit in chancery.**—The state may sue in chancery, and the suit is governed by the same rules as suits between individuals. The solicitor of the circuit in which the suit is pending must attend to the same on the part of the state, and the governor may employ assistant counsel, if he deem it necessary, and the chancellor may determine the

amount of compensation; and if unsuccessful, the state is liable for costs as individual suitors are. The direction of the executive of the state in writing is sufficient authority to the attorney for bringing such suit.

3417 (3756). **How persons of unsound mind may sue.** Persons of unsound mind may sue by next friend, and guardians may be substituted; and upon restoration to sanity, the suit may proceed in their own names.

3418 (3757). **Suits; how commenced.**—The mode of commencing the suit in chancery is by bill, addressed to the chancellor of the division in which the same is filed.

State v. Stow, 51 Ala. 69.

3419 (3758). **Limitation.**—The provisions of chapter 2, title 1, part 3, apply to suits commenced by bill in chancery.

Carter v. Carter, 53 Ala. 365; James v. James, 55 Ala. 525; Coyle v. Wilkins, 57 Ala. 108; Molton v. Henderson, 62 Ala. 426; Love v. Love, 65 Ala. 554; Ware v. Curry, 67 Ala. 274; Thompson v. Parker, 68 Ala. 387; Morrison v. Stevenson, 69 Ala. 448.

3420 (3759). **Filing of bill commencement of suit.**—The filing of the bill is the commencement of the suit, if prosecuted, whether the defendant is brought into court by personal service or by publication.

Crowder v. Moone, 52 Ala. 220; Thompson v. Parker, 68 Ala. 387.

3421 (3760). **In what district filed.**—The bill must be filed in the district in which the defendants, or a material defendant resides; and if to enjoin proceedings on judgments in other courts, it may be filed in the district in which such proceedings are pending, or judgment rendered; and in case of non-residents, in the district where the subject of the suit, or any portion of the same, is, when the cause of action arose, or the act on which the suit is founded was to be performed; or if real estate be the subject-matter of the suit, whether it be the exclusive subject-matter of the suit or not, then in the district where the same, or a material portion thereof, is situated.

Shrader v. Walker, 8 Ala. 244; Freeman v. McBroom, 11 Ala. 943; Branch Bank v. Rutledge, 13 Ala. 196; Porter v. Worthington, 14 Ala. 584; Johnston v. Shaw, 31 Ala. 592; Lewis v. Elrod, 38 Ala 17; Fulmore v. Brady, 44 Ala. 218; Milner v. Ramsey, 48 Ala. 287; Tindal v. Drake, 51 Ala. 574; Waddell v. Lanier, 54 Ala. 440; Ashurst v. Gibson, 57 Ala. 584; Ala. Gold Life Ins. Co. v. Cobb, Ib. 547; Campbell v. Crawford, 63 Ala. 392; Bolling v. Munchus, 65 Ala. 558; Harwell v. Lehman, 72 Ala. 344.

3422 (3761). **Frame of bill.**—The bill must contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition, and conclude with a prayer for the appropriate relief, without averring any combination or confederacy between the defendants, or others, the insufficiency of the remedy at law, or charging pretenses by the defendants; and it is the duty of the courts to discountenance prolix statements and unnecessary and false allegations in all chancery pleadings.

Allegations of bill.—Spence v. Duren, 3 Ala. 251; Bishop v. Bishop, 13 Ala. 475; Cockrell v. Gurley, 26 Ala. 405; Jones v. Cowles, Ib. 612; Caple v. McCollum, 27 Ala. 461; Charles v. Dubose, 29 Ala. 367; Cameron v. Abbott, 30 Ala. 416; Bogan v. Camp, Ib. 276; Bliss v. Anderson, 31 Ala. 613; Bailey v. Jordan, 32 Ala. 50; Danforth v. Herbert, 33 Ala. 497; Lucas v. Oliver, 34 Ala. 626; Kelly v. Allen, Ib. 663; Walthall v. Battle, Ib. 91; Duckworth v. Duckworth, 35 Ala 70; Nix v. Winter, Ib. 309; Crews v. Threadgill, Ib. 334; Martin v. Martin, Ib. 560; Willingham v. Harrell, 36 Ala. 583; Magruder v. Campbell, 40 Ala. 611; Robinson v. Cullom 41 Ala. 693; Long v. Pace, 42 Ala. 495; McKenzie v. Baldridge, 49 Ala. 564; Wolff v.

Shelton, 51 Ala. 429; Williams v. Roe, 59 Ala. 629; Goldsby v. Goldsby, 67 Ala. 560; Jones v. Latham, 70 Ala. 164; Waller v. Allen, 72 Ala. 456; Chandler v. Hanna, 73 Ala. 390; Seals v. Robinson, 75 Ala. 363. **Facts occurring after filing of bill cannot be basis of relief.**—Rives v. Walthall, 38 Ala. 229; P. & M. Ins. Co. v. Selma S. Bank, 63 Ala. 585; Hill v. Hill, 10 Ala. 527; Land v. Cowan, 19 Ala. 297; Vaughan v. Vaughan, 30 Ala. 329. **Bills with double aspect.**—Andrews v. McCoy, 8 Ala. 920; Strange v. Watson, 11 Ala. 325; Stern v. Robertson, 30 Ala. 286; Lucas v. Oliver, 34 Ala. 626; Walthall v. Rives, Ib. 91; Rives v. Walthall, 38 Ala. 329; David v. Shepard, 40 Ala. 587; Micou v. Ashurst, 55 Ala. 607; Eufaula v. McNab, 67 Ala. 588; Rapier v. Gulf City Co., 69 Ala. 476; Shipman v. Furniss, Ib. 555; Adams v. Sayre, 70 Ala. 318; Heyer v. Bromberg, 74 Ala. 524; Caldwell v. King, 76 Ala. 149; Tatum v. Walker, 77 Ala. 563. **The prayer an essential part of bill.**—Driver v. Fortner, 5 Port. 9. **Relief under prayer for general relief.** Thomason v. Smithson, 7 Port. 144; Strange v. Watson, 11 Ala. 324; Kelly v. Payne, 18 Ala. 371; May v. Lewis, 22 Ala. 646; Wiley v. Knight, 27 Ala. 336; Simmons v. Williams, 27 Ala. 507; Kirksey v. Means, 42 Ala. 426; Micou v. Ashurst, 55 Ala. 607; Munford v. Pearce, 70 Ala. 452.

3423. Multifariousness.—Unless taken by demurrer, objection to a bill because of multifariousness must not be entertained. March 1, 1881, p. 143.

3424 (3762). **Waiver of oath to answer.**—When a bill is filed for any other purpose than discovery only, the plaintiff may waive, in or upon the bill, the answer being made on the oath of the defendants, or either of them; and in such case the answer is entitled to no more weight as evidence than the bill.

Guthrie v. Quinn, 43 Ala. 561; Lockhart v. Troy, 48 Ala. 579; Marshall v. Croom, 52 Ala. 554; Griffin v. Bank, 17 Ala. 258; Wilkinson v. Bradley, 54 Ala. 677; Zelnicker v. Brigham, 74 Ala. 598; Watts v. Eufaula Nat. Bank, 76 Ala. 474.

3425 (3763). **Issue of summons.**—Upon the filing of the bill, the register must forthwith issue a summons and copy for each defendant against whom publication is not shown to be necessary, requiring him to appear and demur, plead to or answer the bill within thirty days after service.

3426 (3764, 3765). **Service of summons.**—A copy of such summons must be personally served by the sheriff, if the defendant is to be found in his county, his return indorsed on the original, and returned to the register within five days after service; but it is not necessary to serve a copy of the bill.

Levert v. Redwood, 9 Port. 79; Lyon v. Lorant, 3 Ala. 151; Cleveland v. Pollard, 37 Ala. 556; Kirk v. McAllister, 39 Ala. 343; Florence v. Paschal, 50 Ala. 28.

3427 (3766). **Summons executed in another county returned by mail.**—When the summons is executed in any other county than the one in which the court from which the same issues, is held, the return may be made by mail, directed to the register, the title of the suit being indorsed on the envelope, and the word "summons" written against the same.

3428 (3767). **Mailed within five days.**—When the return is by mail, the summons, directed and indorsed according to the provisions of the preceding section, must be deposited in a post-office of the county in which the same is executed, within five days after the execution.

3429 (3768). **How parties of unsound mind may be made defendants.**—When a party to a suit, or other proceedings in chancery, is alleged to be of unsound mind, and to have no legal guardian, such party may be brought into court by service of process personally upon him, and a guardian ad litem appointed for such person, as in case of infants over fourteen years of age who fail to select or nominate a guardian ad litem.

3430 (3769). **Publication as to non-residents.**—If any defendant is shown to be a non-resident, or if his residence is un-

known, or if, being a resident, he has been absent from the state more than six months from the filing of the bill, or conceals himself so that process cannot be served on him, the register must, on proof thereof by affidavit, make out and superintend the execution of the appropriate order of publication.

Glover v. Glover, 18 Ala. 367; Mims v. Mims, 35 Ala. 23; Mobley v. Leophart, 51 Ala. 587; Paulling v. Creagh, 63 Ala. 398; Elyton Land Co. v. Sayre, 73 Ala. 85; Chilton v. Ala. Gold Life Ins. Co., 74 Ala. 290.

3431 (3770). **Fee for publication deposited with register.** In all cases in which an order of publication is necessary, a sufficient amount of money must be deposited with the register to cover the expense of such publication; and the bill may be dismissed, on thirty days' notice to the plaintiff or his solicitor, on failure to make such deposit within that time.

3432 (3771). **Defendant entitled to copy of bill.**—Any defendant, after service of a summons, or after being brought into court by publication, may, on application to the register, obtain a copy of the bill, to be taxed as other costs.

3433 (3774). **Publication and proceedings against defendants whose names are unknown.**—In cases where it is necessary to make any persons defendants to a bill, and the names of all or any of them are unknown to the plaintiff, and cannot be ascertained on diligent inquiry, and he annexes to his bill an affidavit that the names of such persons are unknown, that he has made diligent inquiry to ascertain the same, and that their residence, as he believes, is not in this state, proceedings may be had, and a decree rendered against them without naming them; and the register must make publication as in case of non-residents, describing such unknown parties, as near as may be, by the character in which they are sued, and with reference to their title or interest in the subject-matter.

Opelika v. Daniel, 59 Ala. 211; Bell v. Hall, 76 Ala. 546.

3434 (3775). **Time for answer; decree pro confesso.**—A defendant must demur, plead, or answer within thirty days after the service of the summons, or within thirty days after the period specified in the order of publication, if the publication required by the order has been perfected, or he must obtain further time; otherwise, a decree pro confesso may be passed.

Pearce v. Daughdrill, 54 Ala. 456.

3435 (3776). **When answer compelled by attachment.** Answers from resident defendants may be compelled by attachment, if the bill is filed for discovery, or answer on oath is not waived.

3436 (3777). **Arrest under attachment; discharge on bond.** Such attachments are executed by the arrest of the defendant and bringing him before a chancellor, circuit judge, or register, who may discharge him on his giving bond with surety in such sum as may be fixed by such chancellor, circuit judge, or register, to be approved by the arresting officer, payable to the register of the court in which the bill is filed, and conditioned that he will file a full answer to the bill, within a time to be prescribed by the officer before whom such defendant is brought; which bond must be returned with the attachment within the same time after service, and in the same manner, if by mail,

as a summons is required to be returned under the provisions of this chapter.

3437 (3778). **Suit on attachment bond.**—Upon the forfeiture of the bond, the chancellor may direct the same to be sued, and the whole or such part of the penalty as he directs may be recovered against any or all of the obligors having ten days' notice, by motion in the circuit court of the county in which the court issuing the attachment is held; and on the trial of such motion, the indorsement by the register of forfeiture is presumptive evidence of the fact.

3438 (3779). **Defendant imprisoned until he files answer or bond.**—In case a defendant refuses or neglects to give such bond, he must be committed to jail by the sheriff, and there kept until he files a full answer with the register.

3439 (3780). **Oath to answer; by whom administered.** When an answer is required to be sworn to, the oath may be administered by any officer authorized to take and certify affidavits, or by a commissioner appointed by the register.

Guice v. Parker, 46 Ala. 616.

3440 (3781). **Protection from full answer.**—A defendant may in his answer protect himself from furnishing a full answer to the allegations of the bill.

Bentley v. Cleveland, 22 Ala. 814.

3441 (3782). **Application to answer specially.**—When a party offers to answer specially, and applies for leave to do so, the ground of such application may be contested, and the application must only be granted upon reasonable notice.

3442 (3783). **All defenses may be set up in answer.**—A defendant may incorporate all matters of defense in his answer, and is not require to plead specially in any case.

Crawford v. Childress, 1 Ala. 482; Shaw v. Lindsey, 60 Ala. 344.

3443 (3784). **Grounds of demurrer.**—A demurrer to the bill must set forth the ground of demurrer specially, and otherwise must not be heard.

Wellborn v. Tiller, 10 Ala. 305; Chapman v. Hamilton, 19 Ala. 121; Cochran v. Rison, 20 Ala. 463; Chambers v. Wright, 52 Ala. 444; Hart v. Clark, 54 Ala. 490; Erwin v. Reese, Ib. 589; Masterson v. Pullen, 62 Ala. 145; P. & M. Ins. Co. v. Selma S. Bank, 63 Ala. 585; Humphreys v. Burleson, 72 Ala. 1.

3444 (3785). **No replication.**—No replication is necessary to an answer.

Forrest v. Robinson, 2 Ala. 215.

3445 (3786). **Effect of answer on hearing on bill and answer.**—When the cause is heard on bill and answer without testimony, the answer must be taken to be true, so far as it is responsive to the allegations of the bill, except in those cases where the complainant has waived the oath of the defendant to the answer.

Bates v. Murphy, 2 Stew. & Port. 165; Forrest v. Robinson, 2 Ala. 215; White v. Florence Bridge Co., 4 Ala. 464; Keiffer v. Barney, 31 Ala. 192; Frazer v. Lee, 42 Ala. 25; Latham v. Staples, 46 Ala. 462; Marks v. Cowles, 61 Ala. 309; Wynn v. Rosette, 66 Ala. 517; Green v. Casey, 70 Ala. 417; Buchanan v. Buchanan, 72 Ala. 56; Foxworth v. White, Ib. 231.

3446 (3787). **Dismissal of suit in vacation.**—Before an answer or cross-bill is filed, the complainant may, on application to the register in vacation, dismiss the suit. On such ap-

plication, the register must enter on the minutes an order of dismissal; and may issue execution against the complainant for all costs which have accrued. After answer or cross-bill filed, the complainant may, on application to the register in vacation, dismiss the suit; and the register must enter an order of dismissal on the minutes. But the defendant, at the next succeeding term of the court, may show cause against the dismissal, and procure a vacation of the order. If cause is not shown at the next succeeding term, the order is final; and execution may issue against the complainant for all costs which have accrued.

CHAPTER 2.

AMENDMENTS, EXCEPTIONS, FILING OF PAPERS, AND SERVING NOTICES; MAKING ANSWER A CROSS-BILL; REVIVOR OF SUIT BY A DEFENDANT.

3447 (3788). **Amendments before answer.**—Amendments to bills before answers, pleas, or demurrers filed, are allowable as of course and without notice; and amendments to any summons may be made before service thereof.

3448 (3789). **Amendments after service and before answer.** After a defendant has obtained a copy of the bill from the register, and before answer, plea, or demurrer, amendments to the bill may be made without notice, upon payment of the costs of furnishing a copy of the amendment to such defendants as have obtained a copy of the bill; and amendments may also be made after demurrer, and before argument on the same terms.

3449 (3790). **Amendments before decree, on terms.** Amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief; and amendments to answers must be allowed at any time before final decree, so as to set up any matter of defense; but such amendments to bills and answers must be allowed on such terms as the chancellor may impose, not extending beyond the payment of all the costs; and if an amendment be allowed at the hearing to bill or answer, the party against whom the amendment is allowed shall be entitled to a continuance as a matter of right; and if the cause is continued, both parties shall have the right to take additional testimony; and if an amendment be allowed in vacation, both parties shall have the right to take additional testimony without a special application.

The allowance of an amendment is a matter of right, if properly moved for, when it does not make an entirely new case, does not cause a radical departure from the original bill, nor work an entire change of parties.—Pitts v. Powledge, 56 Ala. 147; Rapier v. Gulf City Co., 69 Ala. 476; Adams v. Sayre, 70 Ala. 325; Bolman v. Lohman, Ib. 507; Hinton v. Citizens' Ins. Co., 63 Ala. 488; Scott v. Ware, 64 Ala. 174; Jones v. Reese, 65 Ala. 134. **When amendment, under this rule, properly allowable.**—Moore v. Alvis, 54 Ala. 356 (overruling Winter v. Quarles, 43 Ala. 693); Hart v. Clark, Ib. 490; Pitts v. Powledge, 56 Ala. 151; Ala. Warehouse Co. v. Jones, 62 Ala. 550; Dowling v. Blackman, 70 Ala. 303; Adams v. Sayre, Ib. 325; Prickett v. Sibert, 75 Ala. 315; Tatum v. Walker, 77 Ala. 563. **When not.**—King v. Avery, 37 Ala. 169; Gardner v. Pickett, 46 Ala. 191; Leggett v. Bennett, 48 Ala. 380; Penn v. Spence, 54 Ala. 35; Ray v. Womble, 56 Ala. 32; Rapier v. Gulf City Co., 69 Ala. 476; McKay v. Broad, 70 Ala. 377; Ward v. Patton, 75 Ala. 207; Glass v. Glass, 76 Ala. 369. **"To meet any state of the evidence," etc.**—Smith v.

Coleman, 59 Ala. 260; Alexander v. Taylor, 56 Ala. 60; King v. Avery, 37 Ala. 169; Hinton v. Citizens' Ins. Co., 63 Ala. 488. **Amendment making bill one with a double aspect.**—Ala. Warehouse Co. v. Jones, 62 Ala. 550; Rapier v. Gulf City Co., 69 Ala. 476; Adams v. Sayre, 70 Ala. 325; Ward v. Patton, 75 Ala. 207. **The right must be exercised before final decree.**—Smith v. Coleman, 59 Ala. 260; Munter v. Linn, 61 Ala. 492; Winter v. Merrick, 69 Ala. 86. **When in time.**—Martin v. Mohr, 56 Ala. 221. **When new matter may be set up.**—Ala. Warehouse Co. v. Jones. 62 Ala. 550. **While necessary to set up new matter in avoidance of plea or answer,** it is neither necessary nor proper to traverse by amendment defenses set up in the answer.—Smith v. Vaughan, 78 Ala. 201. **Not regular mode of bringing in personal representative or heirs.**—Floyd v. Ritter, 65 Ala. 501. **Doctrine of relation.**—King v. Avery, 37 Ala. 169; Crawford v. Kirksey, 55 Ala. 283; Adams v. Phillips, 75 Ala. 461; Lipscomb v. McClellan, 77 Ala. 151. **When complainant must have opportunity to amend,** before decree dismissing his bill.—Kingsbury v. Flowers, 65 Ala. 486; Lee v. Lee, 67 Ala. 406; Bishop v. Wood, 59 Ala. 253; Kingsbury v. Milner, 69 Ala. 502; Stoudennire v. DeBardelaben, 72 Ala. 300; Shackelford v. Bankhead, Ib. 476; Conner v. Smith, 74 Ala. 115; Gilmer v. Wallace, 75 Ala. 220. **Amendment to answer.**—Shaw v. Lindsey, 60 Ala. 344; Zelnicker v. Brigham, 74 Ala. 598. **Amendment not presumed to have been made,** from the mere fact that leave to amend was granted.—Keith v. Cliatt, 59 Ala. 408. **Imposition of terms discretionary, and not revisable.**—McLane v. Riddle, 19 Ala. 180; Mahone v. Williams, 39 Ala. 202; Rives v. Walthall, 38 Ala. 329.

3450 (3791). **Register may allow amendments after answer.**—The register may, on notice to the opposing party, allow amendments to bills after answer, and amendments to answers, but only on payment of the costs of the amendment by the party making the application.

3451 (3792). **Answer to amendment.**—If an amendment to the bill is made after answer filed, and an answer to the amendment is required, the defendant must answer within thirty days after notice thereof, or obtain further time to answer; failing therein, the matter of the amendment may be taken as confessed. But at any time before the hearing, the order or decree pro confesso may be set aside on application to the register or chancellor, and on filing a full and sufficient answer, on such terms as the chancellor or register may prescribe.

3452 (3793). **What objections set for separate hearing.** When an objection is made to a bill for want of parties, or joinder of improper parties, it may be set for hearing on that objection only; and if not set for hearing on that ground, the court, if the objection prevail on the final hearing, must dismiss the bill.

3453 (3794). **Decree, when objection for want of parties first taken at hearing.**—If the defendant, at the hearing of a cause, take an objection for want of parties, not having by plea or answer taken the objection, the court may render a decree saving the rights of parties not before it, or it may grant leave to amend the bill on terms not extending beyond the payment of costs.

3454 (3795). **Pleadings indorsed with date of filing.**—All bills, answers, and other papers filed in any cause must be indorsed by the register with the true date on which they were filed.

3455 (3796). **Notices; when served on solicitor.**—Notice in relation to any supplemental bill, amendment, decree, motion, or other proceeding in the court of chancery, served on the solicitor of the party, is valid.

3456 (3797). **Notice to parties in default.**—When parties are in default for want of an answer, or other cause, the notices may be entered on the order book of the register, and such

entries, for such time as is fixed by the register, are sufficient in cases of amendments, supplemental bills, and of other orders in the cause.

3457 (3798). **Exceptions to answers.**—Exceptions to answers must be made within sixty days after the same are filed, and notice must be given by the register of the day of hearing the same.

3458 (3799). **Defendant may examine complainant.**—If the defendant wishes to examine the complainant touching the subject-matter of the bill, or his defense, he may, after filing his answer, exhibit interrogatories to the complainant and call upon him to answer the same, and on his failing to answer them within such time as may be prescribed by the register, his bill must be dismissed with costs, unless such time is extended.

3459 (3800). **Exceptions to such interrogatories.**—Exceptions may be taken to such interrogatories and heard before the register at such time as he may prescribe, on reasonable notice to the defendant, or his solicitor, subject to an appeal to the chancellor.

As amended, Jan. 22, 1885, p. 91.

3460 (3801, 3802). **Answer may be made cross-bill.**—A defendant may obtain relief against a party complainant or defendant for any cause connected with, or growing out of the bill, by alleging in his answer, and as a part thereof, the facts upon which such relief is prayed. The matters or facts thus alleged and put in issue must be considered in the nature of a cross-bill, and be heard at the same time as the original bill.

Ex parte Thornton, 46 Ala. 384; Taunton v. McInnish, Ib. 619; Davis v. Cook, 65 Ala. 617; Gilman v. N. O. & S. R. R. Co., 72 Ala. 566; Jones v. Robinson, 77 Ala. 499; Trimble v. Farris, 78 Ala. 260; Lehman v. Dozier, Ib. 235.

3461 (3803, 3804). **Answer to such matter.**—The party complainant or defendant, as to whom such new matter is alleged, must make answer thereto under the rules and regulations provided in this title for the answers of defendants to original bills. An answer on oath may be required or waived in or upon the answer introducing such matter; and if an answer on oath is waived, the answer is not evidence for the party respondent.

3462 (3805). **Revivor of suit by defendant.**—Upon the abatement of a suit by reason of the death of the complainant, or if he be suing as executor, administrator, or trustee, by reason of his resignation or removal, if there be not, within ninety days after his death, resignation, or removal, an application to revive by his legal representative, his successor, or party in interest, a defendant, having an interest in the further prosecution of the suit, may, at any time within twelve months, revive the same by bill of revivor, or by bill of revivor and supplement, or by bill of revivor and cross-bill.

Paulling v. Creagh, 63 Ala. 398.

CHAPTER 3.

EVIDENCE IN CHANCERY.

3463. Oral examination of witnesses.—Either party may require witnesses residing within one hundred miles of the place of trial, to be examined orally, instead of by interrogatories. Such examination may be taken before the register, or before an examiner appointed by the court, or by a special commissioner of the appointment of the register, as the applicant may desire. Feb. 17, 1885, p. 140, sec. 1.

3464. Notice of oral examination.—Notice of the requirement of an oral examination must be given by the party desiring it to the adverse party, or to his solicitor of record, if he have such solicitor residing in the district; but if such adverse party do not reside in the district, and have no solicitor of record residing therein, notice may be given by an entry on the order book of the register. Ib. sec. 2.

3465 (3806). **Testimony by interrogatories.**—In all other cases than that provided for in the first section of this chapter, testimony in chancery causes must be taken by interrogatories, under the rules now in force, or such as may hereafter be adopted.

3466 (3807). **Rules as to competency same as at law.** The rules of evidence as to the competency of witnesses in courts of chancery are the same as in courts of law.

3467 (3808). **Testimony, when taken.**—The plaintiff may take testimony at any time after answer, or after a decree pro confesso, and the defendant at any time after filing his answer.

P. & M. Bank v. Walker, 7 Ala. 926; Reynolds v. Pharr, 9 Ala. 560; Jordan v. Jordan, 17 Ala. 466.

3468 (3809). **Proof of exhibits proved before register.**—Exhibits to bills and answers may be proved by affidavits filed with the exhibits in the register's office thirty days before the hearing.

3469 (3810). **When testimony may be retaken.**—The party against whom the deposition of a witness has been taken, may retake the testimony of such witness, under the provisions of section 2811 (3080), and the provisions of that section apply to such testimony when taken.

3470 (3811). **Commissions to take testimony.**—All commissions for the taking of testimony must be directed to one or more commissioners, to be appointed by the register, and made returnable with all convenient speed.

Potier v. Barclay, 15 Ala. 439; Colgin v. Redman, 20 Ala. 650; King v. King, 28 Ala. 315; Harris v. Miller, 30 Ala. 221; Guice v. Parker, 46 Ala. 616.

3471 (3812). **Service of interrogatories.**—No commission to take testimony must issue until the adverse party, or his solicitor, if either of them reside in the district, has been served with a copy of the interrogatories for ten days.

Atkinson v. Atkinson, 17 Ala. 256.

3472 (3813). **If adverse party a non-resident.**—If such adverse party, or his solicitor, do not reside in the district, this notice may be given by filing interrogatories in the office of the register for ten days.

3473 (3814). **Rebutting interrogatories.**—After such notice has been given, if cross interrogatories are filed, the party has five days to file rebutting interrogatories; but this time may be extended on application to the register without notice.

3474 (3815). **Register may act as commissioner, unless objected to.**—When interrogatories are filed in the chancery court for the purpose of taking the deposition of a witness in any cause pending in such court, and the solicitor filing the same shall appoint the register, in writing indorsed on the interrogatories, as the commissioner to take the same, the register may proceed to take the testimony of the witness specified in the interrogatories, under the rules and regulations applying to the taking of such testimony by commissioners appointed by such register, unless the opposite party, within ten days after such interrogatories are filed, files an objection in writing, when the appointment of a commissioner must be made as usual.

3475 (3816). **Attendance of witnesses before commissioners.**—The attendance of a witness may be enforced by commissioners in chancery causes in the same mode, and their attendance proved and certified to the register in all respects the same, as in the execution of commissions from courts of law.

3476 (3817). **Default of witness.**—If the witness fail to attend before the commissioner, being served with a subpœna so to do, the commissioner must indorse on the subpœna that the witness failed to attend, and return the same to the clerk of the circuit court of the county, who must enter the case on the docket, and such proceedings may be had as in the case of defaulting witnesses in the circuit court, the indorsement on the subpœna being presumptive evidence of the default of such witness.

CHAPTER 4.

REFERENCES TO THE REGISTER.

3477 (3818). **Proceedings before the register on reference.** Whenever a reference is made to the register, the party at whose instance, or for whose benefit the reference is made, must cause such matter to be presented to the register within the time limited for the hearing, and if no time is limited, within three months after the reference is made; and if such party omit to do so, the adverse party may cause proceedings to be had before the register, at the costs of the party procuring the reference.

3478 (3819). **Notice of day for hearing; proceedings thereon.**—Upon any such reference, the register must assign a time and place for proceeding therein, and give reasonable notice to each of the parties, or their solicitors; and if either party fail to appear at the time and place appointed, the register may proceed ex parte, or, in his discretion, adjourn the examination to another day, giving notice to the adverse party, or his counsel, of such adjournment.

3479 (3820). **Authority of the register on reference.**—The

register, in all matters referred, must proceed with the least practicable delay, and has authority,—

1. To examine the parties on oath as to all the items of reference.

2. To require the production of all books, papers, writings, vouchers and documents in relation to such matters.

3. To examine on oath, viva voce, all witnesses produced by the parties before him, and take down such evidence in writing.

4. To hear the depositions of witnesses taken under a commission, as in other chancery cases.

5. To do all other acts, and direct all other inquiries and proceedings in the matters before him, which may be necessary, subject at all times to the revision and control of the chancellor.

McCartney v. Calhoun, 11 Ala. 110; Stapler v. Hurt, 16 Ala. 799; Lang v. Brown, 21 Ala. 179; Bailey v. Jordan, 32 Ala. 50; Taylor v. Kilgore, 33 Ala. 214.

3480 (3821). **Evidence in cause used before register.**—All affidavits, depositions and documents, which have been made or filed in the cause, may be used on reference before the register.

Kirkman v. Vanlier, 7 Ala. 217; Aday v. Echols, 18 Ala. 353; Halstead. v. Shepard, 23 Ala. 558; Pearson v. Darrington, 32 Ala. 227; Mahone v. Williams, 39 Ala. 202; Powers v. Dickie, 49 Ala. 81.

3481 (3822). **Exceptions to register's decisions.** — Either party may reserve in writing any question arising on a reference for the revision of the chancellor.

Lewis v. Lewis, Minor, 35; Levert v. Redwood, 9 Port. 79; Kirkman v. Vanlier, 7 Ala. 217; Alexander v. Alexander, 8 Ala. 796; Davenport v. Bartlett, 9 Ala. 180; Gerald v. Miller, 21 Ala. 433; Royall v. McKenzie, 25 Ala. 363; O'Reilly v. Brady, 28 Ala. 530; Brantley v. Gunn, 29 Ala. 387; Foster v. Gressett, Ib. 393; Pearson v. Darrington, 32 Ala. 227; Taylor v. Kilgore, 33 Ala. 214; Bobe v. Stickney, 36 Ala. 482; Kinsey v. Kinsey, 37 Ala. 393; Mahone v. Williams, 39 Ala. 202; Powers v. Dickie, 49 Ala. 81; Lehman v. Levy, 69 Ala. 48; Mooney v. Walter, Ib. 75; Vaughan v. Smith, Ib. 92; Crump v. Crump, Ib. 156; Munden v. Bailey, 70 Ala. 63; Moore v. Randolph, Ib. 575; Clark v. Knox, Ib. 607; Winter v. Banks, 72 Ala. 409; Pruitt v. McWhorter, 74 Ala. 315.

CHAPTER 5.

DECREES PRO CONFESSO AND FINAL DECREES WITHOUT PERSONAL SERVICE.

3482 (3823). **Decrees pro confesso.**—Decrees pro confesso may be taken before the register on the failure of the defendant to demur, plead to, or answer the bill within thirty days after service of the summons, or thirty days after the period specified in the order of publication, if the publication required by the order has been perfected, unless the time for answering or pleading has been extended; in which case, a decree pro confesso may be passed at the expiration of such time.

Levert v. Redwood, 9 Port. 80; Pitfield v. Gazzam, 2 Ala. 325; Arnold v. Sheppard, 6 Ala. 299; Welborn v. Tiller, 10 Ala. 306; Butler v. Butler, 11 Ala. 668; M. & C. R. R. Co. v. Talman, 15 Ala. 472; Carradine v. O'Connor, 21 Ala. 573; Hurter v. Robbins, Ib. 585; Bank v. St. John, 25 Ala. 566; Keiffer v. Barney, 31 Ala. 192; Johnson v. Longmire, 39 Ala. 143; Madden v. Floyd, 69 Ala. 221; Jones v. Beverly, 45 Ala. 161; McDonald v. McMahon, 66 Ala. 115.

3483 (3824). **On such decrees allegations of bill taken as admitted; exceptions.**—In all cases in which decrees pro con-

fesso are lawfully taken, the allegations of the bill are to be regarded as admitted, except in the case of infant defendants, persons of unsound mind, executors, administrators, and bills for divorce.

Garrett v. Ricketts, 9 Ala. 529; Johnson v. Longmire, 39 Ala. 143; Jones v. Beverly, 45 Ala. 161; Thornton v. Neal, 49 Ala. 590.

3484 (3825). **Not heard on day of taking decree.**—No cause in which a decree pro confesso is taken must be heard on the same day; but the cause may be set for hearing on any subsequent day.

McDonald v. McMahon, 66 Ala. 115.

3485 (3826). **Defendant may contest decree on merits, or appear on reference.**—A defendant against whom a decree pro confesso is taken can appear and contest a decree on the merits of the bill, or may appear before the register on a reference.

Davenport v. Bartlett, 9 Ala. 179; Smith v. Robinson, 11 Ala. 840; Thornton v. Neal, 49 Ala. 590; Madden v. Floyd, 69 Ala. 221.

3486 (3827). **Decree set aside on full answer.**—A defendant who has been served with a summons may, at any time before publication of the testimony, on making a proper showing, obtain leave from the chancellor or register to set aside such decree, upon filing a full and sufficient answer, and upon such terms, not extending beyond full costs, as the chancellor deems proper; and the defendant may also plead or demur upon such terms as the chancellor may order.

Davenport v. Bartlett, 9 Ala. 179; Pond v. Lockwood, 11 Ala. 567; Keenan v. Strange, 12 Ala. 290; Hurter v. Robbins, 21 Ala. 585; Bentley v. Cleaveland, 22 Ala. 814.

3487 (3828). **When set aside as against defendant on publication.**—A defendant brought into court by publication, against whom a decree pro confesso has been rendered, may also, before publication of the testimony, set aside such decree on application to the chancellor or register, on filing a full and sufficient answer, and such other terms, not extending beyond the payment of costs to the time of the application, as may be imposed.

3488 (3829). **Answer after publication of testimony.**—The permission to file an answer, after the publication of the testimony, rests in the sound discretion of the chancellor.

3489 (3830). **Decree without personal service not absolute for eighteen months; copy sent defendant.**—A decree made against a defendant, without personal service, who does not appear, is not absolute for eighteen months from the rendition thereof, except as otherwise in this chapter provided; and in such case the court must direct a copy of the decree to be sent to such defendant, or, in case of infants, or persons of unsound mind, or married women, unless the suit or matter determined concerns their separate estates, to their guardians or husbands, if their residences can be ascertained.

Tabor v. Lorance, 53 Ala. 543; Holly v. Bass, 63 Ala. 387; Lehman v. Collins, 69 Ala. 127; Sayre v. Elyton Land Co., 73 Ala. 86.

3490 (3831). **Petition to set aside decree and defend on merits.**—Such defendant may file a petition, showing sufficient cause for setting aside such decree and permitting him to defend the suit on the merits, at any time within such eighteen

months, unless he has been served with a copy of such decree, when such petition must be filed within six months from such service. If the parties have been dismissed, notice of such petition shall be given those in interest. Upon the hearing of such petition, the chancellor has full power to open the decree and proceed with the cause as if no decree had been rendered therein.

See citations to preceding section.

3491 (3832). **When testimony on file used by either party.** In the case provided for in the preceding section, either party may use the testimony of witnesses on file in the cause, who have died or removed from the state after the decree was rendered.

3492 (3835). **When decree becomes conclusive.**—Where personal service of a decree rendered under the provisions of this chapter is made by serving the defendant with a copy of such decree, the same is conclusive and binding on him, if the petition to set aside such decree is not made within six months from such service.

3493 (3836). **To whom preceding section not applicable.** The provisions of the preceding section do not apply to infants, persons of unsound mind, or to married women, unless the suit or matter determined concerns their separate estates; and such persons are allowed twelve months from the termination of their respective disabilities to show cause against such decrees.

3494 (3833). **Rights and liabilities of parties without service extend to representatives.**—The rights and liabilities of any plaintiff or defendant on bills taken pro confesso, without personal service, extend to the personal representatives of any deceased plaintiff or defendant; and with reference to the altered state of the parties, and any new interest acquired, the chancellor may, on petition, upon due notice being given and sustained by proof, permit any party to file such bills and adopt such proceedings as the circumstances of the case may require for having the matter of the decree duly considered, and the rights of the parties interested therein duly ascertained and determined.

3495 (3834). **Execution of decrees on bills taken pro confesso without service.**—It is no objection to the execution of a decree rendered against a defendant, that it was founded on a bill taken pro confesso without personal service; but before the execution of such decree, within eighteen months from the rendition thereof, the plaintiff, or party interested, must give bond, with two sureties, payable to and approved by the register, in a penalty to be prescribed by the chancellor or such register, conditioned to pay the pecuniary value of the personal property which may be disposed of, or placed beyond the control of the court or party, by the execution of the decree, and interest thereon from the time such property is so disposed of, or placed beyond such control; and to account for the value, rents and profits of any real estate transferred by the operation of such decree, and further to abide and perform such decree as the court may render, if the decree taken on the bill pro confesso

is set aside; and the chancellor may, if such decree is set aside, render a final decree against all the parties to such bond.

Holly v. Bass, 63 Ala. 387; Hurt v. Blount, Ib. 327; Sayre v. Elyton Land Co., 73 Ala. 86.

CHAPTER 6.

BILLS OF REVIEW, NE EXEAT, EQUITABLE ATTACHMENTS, AND WRITS OF SEIZURE.

3496 (3842). **Suspension of decree on presenting a bill of review.**—When a decree has been rendered, and a bill of review is presented, the chancellor may direct the proceedings on such decree to be suspended until a decree is rendered on such bill of review, or until the further order of the court; requiring such bond of the plaintiff as will effectually protect the interest of the parties interested in the decree rendered; on which bond the chancellor may render a final decree for any portion, or the whole of the penalty.

Bills of review, and principles governing same.—Caller v. Shields, 2 Stew. & Port. 417; Williams v. Murphy, 1 Port. 40; Bradshaw v. Garrett, Ib. 47; Hogan v. Davis, 3 Ala. 70; P. & M. Bank v. Dundas, 10 Ala. 661; Cochran v. Rison, 20 Ala. 463; Ex parte Smith, 34 Ala. 455; McDougald v. Dougherty, 39 Ala. 409; Stallworth v. Blum, 50 Ala. 46; Noble v. Hallonquist, 53 Ala. 229; Bishop v. Wood, 59 Ala. 253; Tankersley v. Pettis, 61 Ala. 354; Goldsby v. Goldsby, 67 Ala. 560; George v. George, Ib. 192; Cresswell v. Jones, 68 Ala. 420; McCall v. McCurdy, 69 Ala. 65; Ashford v. Patton, 70 Ala. 479.

3497 (3843). **Application to file such bills, when made.** Application to file bills of review must be made within three years after the rendition of the decree, except in cases of infants, or married women, unless the matter of the decree relates to their separate estates, and persons of unsound mind, who may apply within three years after the termination of their respective disabilities.

Gordon v. Ross, 63 Ala. 363.

3498 (3844). **Writ of ne exeat; equitable attachment.** Writs of ne exeat and equitable attachments may issue on equitable debts and demands in any case in which an attachment at law may issue; and in the issue of equitable attachments, and all the proceedings thereon, the provisions in relation to attachments from courts of law must be observed, except so far as may be otherwise provided in this chapter.

Ne exeat.—Lucas v. Hickman, 2 Stew. 111; Baker v. Rowan, 2 Stew. & Port. 361. **Equitable attachment.**—McKenzie v. Bentley, 30 Ala. 139; Smith v. Moore, 35 Ala. 76; s. c., 37 Ala. 327; Saunders v. Cavett, 38 Ala. 51.

3499 (3845). **Chancellors may examine answers in such cases in vacation.**—Chancellors may, in vacation, examine all answers in relation to writs of ne exeat and attachments returnable into chancery, and writs of seizure, discharge, or reduce, any bail taken, or levy made, on application and reasonable notice to the adverse party.

See citations to section 3498.

3500 (3846). **Attachments on legal demands to subject equitable effects.**—Courts of chancery may also issue writs of attachment on legal demands, founded on any judgment or con-

tract, express or implied, in such cases as attachments may issue from courts of law; which attachments operate only on the effects of the defendant held by an equitable title, or on demands owing by other persons, to which the defendant against whom the attachment issues is in equity entitled, whether due or not.

3501 (3847). **Attachments may issue before judgment for debt.**—To authorize the issue of equitable attachments, it is not necessary that the demand of the plaintiff should be reduced to a judgment, but the court may render a decree for the amount proved, and execution may issue to enforce the same as from courts of law.

3502 (3848). **Property to be specified.**—Equitable attachments must specify the property, effects, or demands, on which they are intended to operate; and a copy of the bill must, in such cases, be served with the summons.

3503 (3849). **Replevy of property attached.**—Any property levied on by an equitable attachment may be replevied by the defendant, or any one for him, on giving bond with surety in double the value of the property levied on, to be approved by the sheriff, payable to the plaintiff, and conditioned as replevy bonds on attachments from courts of law.

3504 (3850). **Replevy bond to be returned.**—When property levied on by an equitable attachment is replevied, the bond must be returned with the attachment.

3505 (3851). **Lien of such attachments.**—Equitable attachments are a lien upon the property or debts attached from the service of the attachment.

3506 (3852). **If property not delivered, execution issues on replevy bond.**—If a decree is rendered in a case in which an equitable attachment has been levied, and the property replevied is not forthcoming within such time as the court may direct, to be proved by the affidavit of the party before the register, the replevy bond in such case has the force of a judgment, and execution may issue thereon for the whole, or any portion of the penalty, as the court may direct, against any or all of the parties thereto.

3507 (3853). **Writs of ne exeat and attachment; orders in respect to.**—Chancellors, circuit judges and registers of the court in which the bill is filed, may make all necessary orders for the issuing of writs of ne exeat and equitable attachments, and for the sale of personal property levied on, as in like cases from courts of law; the money arising from such sale to be paid to the register.

3508 (3854, 3855, 3856). **Garnishments may issue.**—On all decrees for the payment of money, or on all decrees for the payment of costs, and in all suits in which a decree for the payment of money may be rendered, a writ of garnishment may be issued by the register, under the rules and regulations prevailing in the circuit courts.

Jones v. Crews, 64 Ala. 368; Henderson v. Ala. Gold Life Ins. Co., 72 Ala. 32.

3509 (3857). **Writs of seizure in aid of suit commenced in chancery.**—Writs may also issue from the courts of chancery on an original bill, or in aid of a suit pending in such court,

by the order of any chancellor, judge of the circuit court, or register, for the seizure of personal property, when the same is claimed under an equitable title, or when a decree is sought against the same, and it is in danger of being wasted, carried beyond the jurisdiction of the court, or otherwise disposed of.

Walker v. Radford, 67 Ala. 446.

3510 (3858). **Affidavit to be made by plaintiff.**—The plaintiff in such case must sustain his claim by affidavit, and give bond with surety, payable to the defendant, in double the value of the property, to be approved by the register, conditioned to pay all damages the defendant may sustain by the wrongful or vexatious suing out of such writ.

3511 (3859). **Property restored on giving bond.**—The officer executing such writ must restore the property seized to the defendant, on his giving bond in double the value of the same, with surety, to be approved by such officer, payable to the plaintiff, and conditioned to have such property forthcoming to answer the decree of the court.

3512 (3860). **When property delivered to plaintiff.**—If the defendant neglects, for five days after the seizure of such property, to give such bond, the sheriff must deliver the same to the plaintiff, on his giving bond with surety in double the value of such property, to be approved by the sheriff, payable to the defendant, conditioned, if unsuccessful in his suit, to return such property within thirty days after its determination.

3513 (3861). **Return of writs and bonds.**—Such writs, with the proper return thereon, and the bonds taken under the provisions of either of the last two sections, must be returned to the register of the court from which the writ issues.

3514 (3862). **Decree when plaintiff sustains his claim.**—If the claim of the plaintiff is sustained, the court may direct that if its decree in relation to such property is not performed within a specified time, execution may issue on the bond of the defendant for all, or such portion of its penalty as the court may determine under all the circumstances.

3515 (3863). **Liability of plaintiff and his sureties.**—If the plaintiff is unsuccessful, and fails to deliver the property to the defendant within thirty days after the determination of the suit, he and his sureties are liable to an action, and, in case of a recovery, to damages, not exceeding fifty per centum on the value of the property.

3516 (3864). **Equitable attachment for benefit of surety in written contract.**—A writ of attachment may be issued out of the court of chancery, on the application of any surety, indorser, accommodation drawer, acceptor, or maker of any bond, bill, or note, or other contract in writing, against the principal debtor, to be levied on the property or effects of the defendant, whether held by a legal or equitable title, whenever such surety, indorser, acceptor, maker, or drawer, could sue out an attachment at law, if he was a creditor of such principal debtor; and the provisions in reference to attachments at law must be observed in the issue of such attachments, and such writ of attachment may be granted by the register in chancery.

Peevey v. Cabaniss, 70 Ala. 253.

3517 (3865). **When such attachments may be dissolved.** When such attachments are sued out by any indorser, surety, acceptor, maker, or drawer, of any bond, bill, note, or other contract in writing, not due and payable, such attachment must be dissolved, on application to the chancellor, in vacation or term time, or by the register in vacation, on the principal debtor furnishing the complainant complete indemnity against his liability, and paying all costs which may have accrued on such attachment.

Peevey v. Cabaniss, 70 Ala. 253.

3518 (3866). **Decree in favor of surety.**—No decree must be rendered in favor of the complainant in such attachment, until he has paid the debt for which he is liable as the surety, indorser, accommodation maker, drawer, or acceptor, of the defendant.

3519. Creditor may intervene.—If the surety die before paying the debt, and there is not administration of his estate, or his personal representative fail or refuse for sixty days to revive the suit, the creditor may by petition intervene and prosecute the suit to a final decree in his own name, becoming liable for the costs as if he had been the original complainant. March 1, 1881, p. 33.

CHAPTER 7.

INJUNCTIONS; APPOINTMENT OF RECEIVERS.

3520 (3867). **By whom granted.** — Injunctions may be granted, returnable into any of the courts of chancery in this state, by the judges of the supreme and circuit courts, chancellors, and no other officers.

Shrader v. Walker, 8 Ala. 244; Butler v. Butler, 11 Ala. 668; Freeman v. McBroom, Ib. 943; Eldridge v. Turner, Ib. 1049; Branch Bank v. Rutledge, 13 Ala. 196; Ex parte Green, 29 Ala. 52.

3521 (3868). **Injunction of judgment a release of errors.** An injunction obtained by a defendant to a judgment at law, to stay proceedings thereon, operates as a release of errors as to such defendant.

3522 (3869). **Bond on injunction of judgment.**—No injunction must issue to stay proceedings after judgment, in a personal action, until the party at whose application the writ issues gives bond with surety, in double the amount of such judgment, payable to and approved by the register, conditioned, on the dissolution of such injunction, to pay the amount of the judgment enjoined with interest, and also such damages and costs as may be decreed against such party.

Wiswell v. Munroe, 4 Ala. 9; Buckner v. Stewart, 34 Ala. 529; Dubberly v. Black, 38 Ala. 193; Barnard v. Davis, 54 Ala. 565; Thorington v. Gould, 59 Ala. 461; Washington v. Timberlake, 74 Ala. 259.

3523 (3870). **Bond on injunction after recovery of lands.** No injunction must issue to stay proceedings at law after judgment, in any action for the recovery of lands, unless the party give bond with surety, payable to and approved by the register, in such sum as the officer granting the application directs, conditioned for the payment of the damages in such judgment, if

enjoined, and also all damages and costs which the plaintiff in such judgment sustains by the suing out of such injunction, if the same is dissolved.

3524 (3871). **Bond on injunction in other cases.**—In other cases, the party must give bond with surety, in such sum as the officer granting the application directs, payable to and approved by the register, and conditioned to pay all damages and costs which any person may sustain by the suing out of such injunction, if the same is dissolved.

Moore v. Harton, 1 Port. 15; Garrett v. Logan, 19 Ala. 344; Holmes v. Weaver, 52 Ala. 516; Jones v. Ewing, 56 Ala. 360; Adams v. Olive, 57 Ala. 249; Robertson v. Robertson, 58 Ala. 68; Bolling v. Tate, 65 Ala. 417.

3525 (3872). **Application for injunction refused; how renewed; when refusal final.**—If any application is made to a circuit judge for an injunction, and refused, no other circuit judge can act on the application, but the application may be made to a chancellor or judge of the supreme court; if refused by a chancellor, it may be renewed to a judge of the supreme court, but no other officer; and, if refused by a judge of the supreme court, cannot be renewed.

3526 (3873). **Application to justice of supreme court.**—No application must be made to a judge of the supreme court for an injunction, or other equitable process which may be granted by any other judge or officer, unless the same has been made to such other judge or officer, and refused by him.

3527 (3874). **Refusal to grant injunction indorsed on bill.** When an application for an injunction is refused, the officer to whom the same is made must indorse his refusal on the bill, and sign his name thereto; and any one erasing such indorsement is guilty of a misdemeanor, and, on conviction thereof, must be fined not less than five hundred dollars.

3528 (3875). **On dissolution of injunction, damages granted for delay.**—Whenever an injunction to stay proceedings in an action is dissolved on a final hearing, the chancellor may decree six per centum damages on the amount of money for which such judgment was enjoined, if of opinion that the injunction was obtained for delay.

Crawford v. Bank, 5 Ala. 55; Mallory v. Matlock, 10 Ala. 595; Weissinger v. Johnson, 13 Ala. 93; Wharton v. Jones, 49 Ala. 102.

3529 (3876). **Effect of bond on dissolution of injunction of a judgment; execution.**—A bond to enjoin proceedings at law on a judgment for money, upon the dissolution thereof, in whole or in part, either upon an interlocutory or final decree, has the force and effect of a judgment; and being certified by the register to the clerk of the court in which the judgment was rendered, execution may issue against any or all the obligors thereto, for the amount of such judgment which has been enjoined, interest and the damages decreed.

McCalley v. Williams, 77 Ala. 549.

3530 (3877). **Execution for costs.**—The register may also issue execution for costs, if decreed against the party obtaining the injunction, against any or all the parties to the bond.

Newsom v. Thornton, 61 Ala. 95.

3531 (3878). **If injunction of judgment is dissolved pending suit, refunding bond required.**—When an interlocutory

decree is made dissolving an injunction to stay proceedings on a judgment at law, the chancellor must require of the defendant a refunding bond, in double the amount of the sum enjoined, payable to, and to be approved by the register, conditioned to refund the money and interest he may collect on the judgment, if the same is, on the final hearing of the bill, perpetually enjoined; and the court may render a final decree on such bond against any or all the parties thereto.

Robertson v. Walker, 51 Ala. 485.

3532 (3879). **Motion to dissolve in vacation.**—A defendant may move to dissolve an injunction in vacation before the chancellor of the division in which the bill is filed, either for want of equity, or on the coming in of the answer, to be heard on certified copies of the bill and answer; but ten days' notice of such application must be given to the plaintiff or his solicitor.

When injunction dissolved on denials in answer.—Withers v. Dickey, 1 Stew. 190; Hogan v. Branch Bank, 10 Ala. 485; Hudson v. Crutchfield, 12 Ala. 433; Barney v. Earle, 13 Ala. 106; Moore v. Barclay, 23 Ala. 739; Jones v. Cowles, 26 Ala. 612; Hill v. Averett, 27 Ala. 484; Rogers v. Bradford, 29 Ala. 274; Miller v. Bates, 35 Ala. 580; Brooks v. Diaz, 35 Ala. 599; Saunders v. Cavett, 38 Ala. 51; Yonge v. Sheppard, 44 Ala. 315; Satterfield v. John, 53 Ala. 127; Barr v. Collier, 54 Ala. 39; Collier v. Falk, 61 Ala. 105; Weems v. Weems, 73 Ala. 462; E. & W. R. R. Co. v. E. T., V. & G. R. R. Co., 75 Ala. 275. **When answer does not warrant dissolution.**—Calhoun v. Cozens, 3 Ala. 498; McClure v. Colclough, 6 Ala. 492; Rembert v. Brown, 17 Ala. 667; Hinson v. Brooks, 67 Ala. 491. **When may be dissolved on answer of one of several defendants.**—Long v. Brown, 4 Ala. 622; Dunlap v. Clements, 7 Ala. 539; Mobile Commissioners v. Putnam, 44 Ala. 506; Garrett v. Lynch, Ib. 683; Colton v. Price, Ib. 424. **When answer of corporation authorizes dissolution.**—Hogan v. Branch Bank, 10 Ala. 485. **On motion, bill cannot be aided by affidavits.**—Withers v. Dickey, 1 Stew. 190; Long v. Brown, 4 Ala. 622. **Answer can be considered, only so far as it is responsive to bill.**—Rubert v. Brown, 17 Ala. 667; Jones v. Ewing, 56 Ala. 360; Farris v. McCurdy, 78 Ala. 250. **Motion may be entertained,** though exceptions have been filed to the answer.—Barney v. Earle, 13 Ala. 106. **In such case, the motion should be considered,** as if the exceptions had been sustained.—Ib. **Injunction should not be sustained,** unless the answer, in clear and explicit terms, denies the equity of the bill.—Rembert v. Brown, 17 Ala. 667. **Should not be dissolved on unsworn answer.**—Rainey v. Rainey, 35 Ala. 282; Hart v. Clark, 54 Ala. 490. **Nor on denials made on information and belief,** when the facts are positively charged in the bill.—Hart v. Clark, 54 Ala. 490. **What answer should show to have injunction dissolved in part,** when answer to a bill for an injunction shows that complainant is entitled to some relief.—Maulden v. Armistead, 18 Ala. 500; Miller v. Bates, 35 Ala. 580. **Dissolved for want of equity in bill.**—Cave v. Webb, 22 Ala. 583; Powell v. Central P. Road Co., 24 Ala. 441; Norris v. Norris, 27 Ala. 519; Harrison v. McCrary, 37 Ala. 687; Garrett v. Lynch, 44 Ala. 683; Hart v. Clark, 54 Ala. 490; Chambers v. Ala. Iron Co., 67 Ala. 353. **Should be dissolved,** although the answer admits all the allegations of the bill.—Nelson v. Dunn, 15 Ala. 501. **On motion to dissolve for want of equity,** all amendable defects in the bill must be considered as amended.—Ala. & Fla. R. R. Co. v. Kenney, 39 Ala. 307; Chambers v. Ala. Iron Co., 67 Ala. 353; Jones v. Ewing, 56 Ala. 360; E. & W. R. R. Co. v. E. T., V. & G. R. R. Co., 75 Ala. 275. **When bill may be retained for other relief,** on dissolution of injunction. Norris v. Norris, 27 Ala. 519; Harrison v. McCrary, 37 Ala. 687. **It is not an unbending rule,** that an injunction should be dissolved when the equity of the bill is denied. The court may, notwithstanding such denial, retain the injunction, when it finds in the facts disclosed good reason for doing so.—Miller v. Bates, 35 Ala. 580; Rembert v. Brown, 17 Ala. 667; Satterfield v. John, 53 Ala. 127. **When notice of motion void for uncertainty.**—Florence v. Paschal, 48 Ala. 458. **Motion may be heard at a place out of the division.**—Griffin v. Branch Bank, 9 Ala. 201. **When motion may be renewed.**—Hudson v. Crutchfield, 12 Ala. 434. **Right of party in contempt to move for a dissolution.**—Jacoby v. Weil, 74 Ala. 427; Crabtree v. Baker, 75 Ala. 632. **Motion to discharge, not motion to dissolve,** is the proper course, when the injunction has been irregularly granted.—Jones v. Ewing, 56 Ala. 360; E. & W. R. R. Co. v. E. T., V. & G. R. R. Co., 75 Ala. 275. **What the proper order when injunction granted without bond.**—Jones v. Ewing, 56 Ala. 360. **Will not be dissolved on account of defects in affidavit to bill,** unless the complainant fails, when required, to verify his bill by sufficient affidavit.—Jacoby v. Goetter, 74 Ala. 477.

3533 (3880). **Notice of injunction to stay a judgment served on the attorney is valid.**—Notices of injunctions, or other restraining process, staying proceedings in suits or on judgments at law, served upon the attorney of the party on whom such injunction or process is to operate, are valid.

3534 (3881). **Receivers appointed by chancellor or register.** Receivers may be appointed by the chancellor in term time or vacation, and by the register in vacation, upon application in writing; and when the application is made in vacation, reasonable notice of the time of such application, and the person to whom it will be submitted, must be given, or a good reason shown to the chancellor or register for the failure to give the same.

Ex parte Walker, 25 Ala. 81; Briarfield Iron Co. v. Foster, 54 Ala. 622; Bard v. Bingham, Ib. 463; Hughes v. Hatchett, 55 Ala. 631; McLean v. Pressley, 56 Ala. 212; Randle v. Carter, 62 Ala. 95; Rapier v. Gulf City Co., 64 Ala. 330; In re Tallasse Mfg. Co., Ib. 568; Scott v. Ware, 65 Ala. 174; Weis v. Goetter, 72 Ala. 259; Micou v. Moses, Ib. 439; Meyer v. Johnston, 53 Ala. 240; Sims vs. Adams, 78 Ala. 395.

3535 (639, 640). **Appointment by register; suspension of order.**—When an order appointing a receiver is made by the register, it shall be subject to appeal to the chancellor, which may be heard in term time or vacation; and such order must be suspended whenever the appellant enters into bond with sufficient sureties, to be approved by the register, in such sum as he shall prescribe, payable to the appellee, and conditioned to pay the appellee all such costs and damages as he may sustain in case the appeal is not prosecuted to effect.

CHAPTER 8.

CORRECTION OF ERRORS IN PROCEEDINGS IN COURT OF PROBATE.

3536 (3837). **Bill in chancery to correct settlements; when to be filed.**—When any error of law or fact has occurred in the settlement of any estate of a decendent, to the injury of any party, without any fault or neglect on his part, such party may correct such error by bill in chancery, within two years after the final settlement thereof; and the evidence filed in the court of probate in relation to such settlement must be received as evidence in the court of chancery, with such other evidence as may be adduced; and a failure to appeal from the decree of the probate court shall not be held to be such fault or neglect as will bar the complainant of the remedy herein provided.

Cowan v. Jones, 27 Ala. 317; Mock v. Steele, 34 Ala. 198; Duckworth v. Duckworth, 35 Ala. 70; Ansley v. King, Ib. 278; Wilson v. Randall, 37 Ala. 74; Morrow v. Allison, 39 Ala. 70; Meadows v. Edwards, 46 Ala. 354; Millsap v. Stanley, 50 Ala. 319; Robertson v. Walker, 51 Ala. 484; Monnin v. Berougon, Ib. 196; Baldwin v. Deming, Ib. 553; Otis v. Dargan, 53 Ala. 178; Waring v. Lewis, Ib. 615; Gamble v. Jordan, 54 Ala. 432; Paulling v. Creagh, Ib. 646; Stabler v. Cook, 57 Ala. 22; Boswell v. Townsend, Ib. 308; Jones v. Fellows, 58 Ala. 343; Bowden v. Perdue, 59 Ala. 409; Hutton v. Williams, 60 Ala. 133; Lowe v. Guice, 69 Ala. 80; Hatcher v. Dillard, 70 Ala. 343; Alexander v. Alexander, Ib. 357; Humphreys v. Burleson, 72 Ala. 1; Lyne v. Wann, Ib. 43; Foxworth v. White, Ib. 224; Stoudenmire v. DeBardeleben, Ib. 300; Cawthorn v. Jones, 73 Ala. 82; Massey v. Modawell, Ib. 421; Waldrom v. Waldrom, 76 Ala. 285.

3537 (3838). **Infants, etc., allowed longer time.**—The limitations of the preceding section do not extend to infants or persons of unsound mind, who are allowed two years after the termination of their respective disabilities.

3538 (3839). **Settlements by guardians may be corrected.** Errors of law or fact in the settlement of accounts of guardians may be corrected in chancery according to the provisions of the two preceding sections.

See citations to section 3536.

3539 (3840, 3841). **Irregular sales of lands under decrees of court of probate may be confirmed.**—Sales of lands made under a decree of the court of probate, the parties in interest having had legal notice of the proceedings in which the decree was rendered, which are invalid because of errors, omissions, or irregularities in the proceedings in the court of probate, may be confirmed by a decree of the court of chancery, if it be shown that the lands were sold for their full value, which has been fully paid to the party entitled to receive it.

Ganey v. Sikes, 76 Ala. 421.

CHAPTER 9.

CREDITORS' BILLS.

3540 (3882). **Creditors' bills to enforce collection of judgments.** — When an execution for money from any court has been issued against a defendant, and is not satisfied, the plaintiff, or the person for whose benefit such execution is sued out, may file a bill in chancery against such defendant to compel the discovery of any property belonging to him, or held in trust for him; and to prevent the transfer, payment, or delivery thereof to such defendant, except when the trust has been created by, or proceeded from some other person than the defendant himself; and the court may bring any other party before it, and decree such property, or the interest of the defendant therein, to the satisfaction of the sum due the plaintiff.

Brown v. Bates, 10 Ala 432; Nix v. Winter, 35 Ala. 309; Mixon v. Dunklin, 48 Ala. 455; Smith v. Cockrell, 66 Ala. 64; Cawthorn v. Jones, 73 Ala. 82; Zelnicker v. Brigham, 74 Ala. 598; Floyd v. Floyd, 77 Ala. 353; Seals v. Pheiffer, Ib. 278.

3541 (3883). **Bill for discovery of collusive judgments or fraudulent conveyances.**—A bill for discovery may be filed, and the defendant compelled to answer such bill, when the defendant is charged with having confessed or suffered a judgment, where no portion, or a part only of such judgment is due, with the intent to hinder, delay, or defraud creditors, or with having conveyed his property with the like intent.

3542 (3884). **Answers to such bills compelled.**—A defendant may be compelled to answer a bill in chancery, charging him with any fraud affecting the rights or property of others.

3543 (3885). **Not evidence on indictment for fraud.**—No answer made to a bill under the provisions of the two preceding sections can be read in evidence against the defendant, on an indictment for any fraud charged in the bill.

3544 (3886). **Creditor without lien may subject property fraudulently transferred.**—A creditor without a lien may file a bill in chancery to discover or to subject to the payment of his debt any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by his debtor.

Reynolds v. Welch, 47 Ala. 200; Todd v. Neal, 49 Ala. 266; Crawford v. Kirksey, 50 Ala. 590; McAnally v. O'Neal, 56 Ala. 299; Lide v. Parker, 60 Ala. 165; Evans v Welch, 63 Ala. 250; Smith v. Cockrell, 66 Ala. 64; Lehman v. Meyer, 67 Ala. 396; Bromberg v. Heyer, 69 Ala. 22; Weis v. Goetter, 72 Ala. 259; Harris v. Moore, Ib. 507; Zelnicker v. Brigham, 74 Ala. 598; Mathews v. Ins. Co., 75 Ala. 85.

3545 (3887). **Bill of discovery by creditor.** — A creditor, having obtained a judgment at law upon which execution has issued and been returned "no property found," or a creditor without a lien or judgment, may, in the court of chancery of the district in which the judgment-debtor resides, or in the court of chancery of the district in which the judgment was rendered, file a bill for the discovery of the assets of the debtor subject to the payment of debts; and the debtor must answer on oath, and disclose all property, real or personal, in which he may have, or may claim an interest, legal or equitable; all moneys, effects, or choses in action, in which he may have, or may claim an interest, legal or equitable; where such property, real or personal, is situate, or may be found; who has, or may claim possession thereof; in whose possession are the moneys, effects, or choses in action, in which he has, or may claim an interest, legal or equitable, and where such moneys, effects, or choses in action may be found.

Ex parte Hardy, 68 Ala. 303

3546. Several judgment creditors may join in such bill; assignee of judgment may file.—Any number of judgment-creditors upon whose judgments executions have issued and been returned "no property found," may join as complainants in such bill. The assignee of a judgment, or the several assignees of several judgments, may maintain such bill.

3547 (3888). **Orders; decrees.**—If from the answer it appears that the defendant has property, real or personal, or an interest in property, real or personal, subject to the payment of debts; or has moneys, effects, or choses in action, or an interest in moneys, effects, or choses in action, subject to the payment of debts, whether such property, moneys, effects, or choses in action, be within or without the state, the court, in term time or in vacation, must make all such orders or decrees as may be necessary and proper to reach and subject such property, moneys, effects, or choses in action, and for that purpose may appoint a receiver with authority to demand, sue for and recover, or otherwise to reduce to possession such property, moneys, effects, or choses in action; and may require the judgment-debtor to make to such receiver all conveyances, assignments, or transfers, which may be necessary and proper to enable him to receive, or to sue for and recover such property.

3548 (3887). **Examination of debtor.**—After answer filed, on the application of the complainant showing a necessity therefor, which application must be verified by oath, the chancellor, in term time or in vacation, may order an examination of the debtor before the register, or before an examiner specially ap-

pointed, touching and concerning his property, real or personal, moneys, effects, or choses in action; and it is the duty of the debtor to attend at the time and place to which he may be summoned by the register or examiner, and submit to such examination.

CHAPTER 10.

TRUSTS AND TRUSTEES.

ARTICLE 1.—Express trusts for payment or security of debts.
2.—Investment, removal and liability of trust estates.
3.—Resignation, appointment and removal of trustees.

ARTICLE I.

EXPRESS TRUSTS FOR PAYMENT OR SECURITY OF DEBTS.

3549. Trustee of certain express trusts required to give bond.—When an express trust is created for the payment or security of debts, and by the terms thereof the trustee is not required to give bond with surety, any creditor interested therein may apply to the register of the court of chancery of the district in which the trust property, or the most valuable portion thereof, may be, for an order requiring such trustee to give bond with surety for the faithful administration of the trust. Feb. 26, 1881, p. 139, sec. 1.

Jones v. McPhillips, 77 Ala. 314.

3550. Contents of application; notice.—The application must be in writing, verified by affidavit; must state the nature and character of the trust and of the interest of the applicant therein, and must state, in the opinion of the applicant, said interest is, or will be endangered, if bond with sureties is not required of such trustee; and, on the filing of such petition, the register must appoint a day for the hearing thereof, of which not less than five days' notice, by the service of summons to appear and answer, must be given the trustee, if he resides in the state; and if he resides without the state, notice must be given by publication for three successive weeks in some newspaper published in the district, if there be such paper, and if there be not, in the paper published nearest to such district. Ib. sec. 1.

3551. Hearing; order.—On the day appointed, or on any other day to which such application may be continued, if it appears that the applicant has a real, bona fide interest in the administration of the trust, and that by the terms thereof the trustee is not required to give bond with surety, and that a majority in number and interest of all the creditors for whose benefit such trust may be created do not oppose such application, the register must make and enter an order requiring such trustee to give bond with at least two good and sufficient sureties, payable to such register, in such sum as the register may prescribe, subject to change on application to the chancellor in term time or vacation, with condition for the faithful discharge of all the duties of such trustee, which bond must be approved, filed and recorded in his office. Ib. sec. 1.

Ib. sec. 2.

3552. Failure of trustee to give bond; appointment of successor.—If the trustee fails, for three days from and after the making of such order, to give such bond, the register must make and enter an order removing him as trustee, and may make and enter an order appointing a successor, of whom bond with sureties, payable and conditioned as provided in the preceding section, must be required.

Ib. sec. 4.

3553. Inventory of trust property to be filed and recorded. It is the duty of a trustee of an express trust created for the payment or security of debts, within fifteen days after entering upon the execution of such trust, to file in the office of the register of chancery of the district in which the most valuable portion of the trust property may be, an inventory of the entire trust property, so far as the same may have come to his knowledge, or to his possession, describing the real estate, enumerating each article of personal property, and stating the amount and character of all choses in action, if there be any, subject to the trust; which inventory must be verified by affidavit and recorded in the office of the register; and of all property or choses in action subject to the trust, subsequently coming to the knowledge or possession of the trustee, a supplemental inventory must be filed and recorded.

Ib. secs. 4, 7.

3554. Appraisement of trust property.—On the filing of such inventory, the register must appoint three disinterested persons appraisers of and in each county in which any part of the trust property may be, and must furnish them a copy of such inventory; and the appraisers must, in writing, appraise at its true value the property described or enumerated in such inventory, found in the county for which they may be appointed, and must subscribe such appraisement, verify the same by affidavit, and make return thereof to the register, by whom it must be recorded; and the appraisers are severally entitled to two dollars for each day's service in making such appraisement, to be taxed as costs and collected and paid over by the register.

ARTICLE II.

INVESTMENT, REMOVAL, AND LIABILITY OF TRUST ESTATE.

3555 (3742). **Trustees may invest in state or United States securities.**—A trustee, having moneys to invest or loan, may invest them in the purchase of the interest-bearing securities of this state, or of the United States; but for such investment his liability is governed by the general rules of law.

3556 (3743). **Investment without the state.**—If the cestuis que trust, or or any of them, reside without the state, and the trustee has funds to loan or invest, the loan or investment whereof in the state of their residence is desirable, the trustee may there loan and invest them, under the authority of a decree of the court of chancery.

3557 (3743). **Mode of obtaining authority.**—The trustee may obtain authority for the making of such loan or investment, by petition to the court of chancery of the district in which the trust was created, or in which the trust is being administered. The petition must be verified by affidavit, and must state who

are the parties having interests in the funds, the nature of the interest, their places of residence, which of them, if any, are minors or of unsound mind, the amount and character of the fund to be loaned or invested, the security upon which the loan is to be made, or the nature and character of the investment to be made, and the facts which render such loan or investment desirable.

3558 (3743). **Hearing; notice of petition.**—The petition may be heard, and decree may be rendered in term time or in vacation. On the filing of the petition, the time for the hearing must be fixed by the register, and thereof notice must be given to such of the cestuis que trust as are of full age and of sound mind, residing in this state, by the service of summons for at least ten days; and like notices to such as are minors or of unsound mind, by the service of summons on their guardian, if any they have; and if they have no guardian, upon such person as may have charge of them, or with whom they may reside. Notice by publication for such length of time, and in such mode as the chancellor may direct, shall be given to the cestuis que trust who reside without the state. The chancellor or register, after notice has been given, must appoint a suitable person as guardian ad litem to represent the cestuis que trust who are minors or of unsound mind.

3559 (3743). **Decree on hearing.**—If, on the hearing, the court is satisfied from the evidence adduced, which may be oral, or by deposition, that it would be to the interest of the cestuis que trust that the loan or investment should be made, it must render a decree authorizing it.

3560 (3744). **Removal of trust estate.**—The court of chancery of the district in which a trustee resides, or in which a trust estate is created, or is being administered, may authorize the removal of such estate to another state.

3561 (3745). **Mode of obtaining authority for removal.** A cestui que trust or a trustee may obtain authority for the removal of a trust, by petition verified by affidavit, which may be heard in term time or in vacation, and which must state the property to be removed, the place to which removal is desired, the names and residences of the parties having interests therein, which of them, if any, are minors, or of unsound mind, and the facts which show that the removal will be of benefit to the cestuis que trust.

3562 (3745). **Hearing; notice.**—On the filing of the petition, the register must appoint a day for the hearing thereof, of which notice for at least ten days must be given the parties residing within this state, by the service of summons. If any of such parties be minors or of unsound mind, summons must be served on their guardian, if any they have, or if they have no guardian, upon such person as may have charge of them, or with whom they may reside. If any of such parties reside without the state, notice must be given them by publication, in the mode, and for the length of time prescribed by the chancellor. After notice given, the register or chancellor must appoint a suitable person as guardian ad litem to represent and defend for the minors or parties of unsound mind.

3563 (3746). **Decree on hearing.**—If, on the hearing, the

court is satisfied from the evidence adduced, which may be oral or by deposition, that a removal would be to the interest of the cestuis que trust, a decree must be rendered authorizing it. But before the execution of the decree, the party or parties, at whose instance the removal is to be made, must, in the state to which the property is to be removed, before a court having jurisdiction, give bond with sufficient surety, to be approved by such court, in penalty and with condition that will fully protect all parties in interest from loss or injury by reason of the removal, or because of the waste or negligence of the party or parties to whose care and custody such property is intrusted; which bond must be properly certified, and filed in the court of chancery, and must, before the removal, be approved by the chancellor.

3564 (3747). **Liability of trust estate.**—A trustee, or an executor, or an administrator, may render the estate in his hands to be administered liable for the payment for necessary services rendered to him, or for necessary repairs in and upon the estate, or for necessaries furnished to him, if he be or become insolvent without making payment, and has not charged the estate with, and obtained credit for such services, repairs, or necessaries.

3565 (3747). **Mode of enforcing such liability.**—The liability of the estate may be enforced by the party rendering such services, or by whom such repairs were made, or necessaries furnished, or by his assignee, or by the personal representative of either, by petition filed in the court of chancery against such trustee, executor, or administrator, or, if his authority has terminated, against his successor in the trust or administration; which petition may be filed in the district of the residence of the defendant, or in the district in which such estate is situate, or is being administered. If pending suit an abatement occurs by the death or disability of the petitioner, or by the termination of the authority of the trustee, or of his successor, there may be a revivor as in other suits in equity.

3566 (3747). **Decree.**—If, on the hearing, the evidence is sufficient, the court must render a decree charging the trust estate, or the assets subject to administration, with the payment of the sum ascertained to be due the petitioner, and with the costs of the petition; and if the decree be against an executor or an administrator, or his successor, it must be preferred in payment, as are the fees and charges of administration.

Daily v. Daily, 66 Ala. 266; Steele v. Steele, 64 Ala. 438.

3567 (3748). **When suit for administration pending.**—If there be a pending suit, in which the court of chancery has taken jurisdiction of the administration of the trusts, or of the estate, the petition must be filed in, and become a part of the proceedings in such suit.

Munden v. Bailey, 70 Ala. 63.

3568. Real estate to be charged.—If the personal assets be insufficient, and it be necessary to charge lands descended, or lands devised, with the payment of such claims, the heirs to whom the lands have descended, or the devisees to whom they are devised, must be made parties defendant to the petition.

ARTICLE III.

RESIGNATION, APPOINTMENT AND REMOVAL OF TRUSTEES.

3569 (3727). **Trustee of express trust may resign on application to the register.**—When any express trust is created by will or deed, the trustee may resign on application to the register of the district where the trust property, or the most valuable portion of the same, is, or of the district in which the trustee resided when he was appointed trustee.

3570 (3728). **Notice of the application by advertisement.** Notice of the application must be given in such paper as the register may direct, for three successive weeks.

3571 (3729). **Trustee to account and settle before resignation.**—The trustee must render a full account, and pay over to the parties entitled to the same, or to the register, all moneys due by him.

3572 (3730). **Accounts not conclusive; payments valid.** No account so taken is conclusive on any of the parties interested in the trust; but the trustee may be required to account up to the time of granting the application, in the same manner as if no proceedings had been had; except that he is entitled to the benefit of all payments made by him under the provisions of the preceding section.

3573 (3731). **New trustee appointed; bond, if necessary.** The register, on the granting of such application, may appoint a trustee, and, if necessary to protect the parties interested in the trust property, may require the necessary bond of such trustee.

3574 (3732). **On death of trustee, register appoints another; bond in such cases.**—Upon the death of the trustee of such express trust, the register of the district in which the trust property, or the most valuable portion of the same, is, may, on the application of any party in interest, appoint a trustee, and may also require of him a bond, as under the preceding section.

3575 (3733). **Notice of the application to appoint.**—All the parties interested in such trust property must have ten days' personal notice of such application, or by publication, once a week for three successive weeks, in such paper as the register may direct.

3576 (3734). **Guardians for infants in such cases.**—In any proceeding to appoint a trustee before the register, he has authority, where minors or persons of unsound mind are interested, to appoint guardians ad litem for their defense, and to protect their interest.

3577 (3735). **Causes of removal of trustee, on petition to the chancery court.**—Upon the petition or bill of any person interested in the execution of a trust, the court of chancery may remove any trustee who has violated or threatened to violate his trust; who is insolvent, or whose insolvency there is good reason to apprehend; who has removed from the state; or who, for any other cause, is an unsuitable person to execute the trust; or the court may require such bonds as will effectually protect the interest of the parties.

3578 (3736). **New trustee appointed by the court in such case.**—Such court has authority to appoint a new trustee in the place of a trustee removed, or may cause the trust to be executed by one of its own officers.

3579. Refusal of trustee to accept trust.—If the trustee of an express trust, created by will or deed, refuse to accept and execute the trust, on the application of any party therein interested, the register of the court of chancery of the district in which the trust estate, or the most valuable portion thereof, may be, may appoint a trustee to execute the trust. Notice of the application must be given in such paper as the register may direct, for three successive weeks.

3580 (3737). **Trustee appointed to receive trust property in another state and remove it to this state.**—Where there is trust property in another state, held under deed, will, marriage settlement, or otherwise, and the beneficiary owning the entire interest in such trust property has removed to this state, and desires that the property may also be removed to this state, such beneficiary may, if of age, or by next friend, if a minor or married woman, make application to the register of the chancery court of the district in which such beneficiary resides, to appoint a trustee to receive such trust property and remove the same to this state.

3581 (3738). **Day of hearing appointed and notice given by register.**—The register in chancery must appoint a day for hearing such application, and notice thereof must be given by advertisement in some paper published in the district for three successive weeks, or if no paper is published in such district, by posting such notice at the court-house door, and at three other places in the district, three weeks before the day appointed for hearing the application; and a copy of such notice must be sent to the non-resident trustee of such trust estate, if there be one, and his place of residence be known.

3582 (3739). **Trustee appointed by register.** — Upon the hearing of such application, if there be no good and sufficient reason to the contrary, such register must appoint a trustee living in the district wherein such beneficiary resides to receive and remove the trust property to such district.

3583 (3740). **Bond of trustee.** — Such trustee, before he enters on the discharge of the duties of such trust, must give bond, with good and sufficient surety, payable to the register of such chancery court, in double the amount of the supposed value of such trust estate, conditioned that he will faithfully execute the trust.

3584 (3741). **Fees of register; by whom paid; how refunded.**—A fee of five dollars, to be paid to the register for his services rendered under the provisions of the four preceding sections, must be paid by the party making the application; and such party may be reimbursed for this, and all other expenses growing out of such application, from such trust fund when received by the trustee appointed by such register.

CHAPTER 11.

ISSUES OUT OF CHANCERY.

3585 (3890). **Trial of issues of fact.**—An issue of fact, directed to be tried by a jury, may be tried by a jury summoned to attend the court of chancery, or may be certified for trial to the circuit court of the district. A change of the venue of the trial may be had for good cause shown to the chancellor, as in civil cases in courts of common law.

Kennedy v. Kennedy, 2 Ala. 573; Alexander v. Alexander, 5 Ala. 517; Johnston v. Hainesworth, 6 Ala. 443; Atwood v. Smith, 11 Ala. 894; Hill v. Barge, 12 Ala. 687; Springle v. Shields, 17 Ala. 295; Dabbs v. Dabbs, 27 Ala. 646; Anonymous, 35 Ala. 226; Barnett v. M. & E. R. R. Co., 51 Ala. 555; Marshall v. Croom, 60 Ala. 121; Adams v. Munter, 74 Ala. 338.

3586 (3891). **Evidence in such trials; parties examined.** Such issue must be tried upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause as the court may order; and the court may also order the examination of the parties to the suit, allowing the other party to impeach or contradict such evidence.

3587 (3892). **Proceedings to summon jury, etc., before chancellor.**—If such issue is to be tried before the chancellor, he may make the necessary order for a jury to be summoned, and witnesses to be subpœnaed by the register of the district in which the trial is to be had; and render judgments, conditional and absolute, as the law directs.

3588 (3893). **Practice in partition suits.**—In suits for partition of lands, if the defendant denies the title of the complainant, the chancellor need not dismiss the bill or delay the suit until a trial can be instituted and had at law, but may direct the issue as to the title of the complainant to be tried as other issues of fact are triable, according to the three sections next preceding.

Ormond v. Martin, 37 Ala. 598; McMath v. DeBardeleben, 75 Ala. 68.

3589 (3894). **Pay of jurors and how taxed.**—In all cases in which jurors are summoned to attend upon the chancery courts, they must be allowed the same compensation as jurors attending upon the circuit courts, to be taxed and collected as other costs in the case in which they are called to serve as jurors.

CHAPTER 12.

CALL OF THE DOCKET; HEARING OF CAUSES; RENDITION, LIEN, EFFECT, AND ENFORCEMENT OF DECREES, AND COSTS.

3590 (3895). **Call of docket; setting causes for hearing.** If the term is more than one week, on the first day the docket must be called, not peremptorily, but for orders which may be taken by consent, or for the submission of causes which stand on decrees pro confesso. The call of the docket thereafter may

be peremptory. The parties may by consent set down causes for hearing on such day of the term as they may select.

3591 (3896). **Decrees in writing; rendered in term time or vacation.**—Decrees must be rendered in writing, in term time, if practicable; but in cases deemed by the chancellor difficult, he may reserve the rendition of decree until vacation, and may render it at any time before or during the next term.

Decrees in vacation.—Erwin v. Reese, 54 Ala. 589; Forrest v. Luddington, 68 Ala. 1; Hooper v. Strahan, 71 Ala 75; Rogers v. Torbut, 58 Ala. 523. **When error to dismiss bill in vacation,** without affording the complainant an opportunity to amend.—Bishop v. Wood, 59 Ala 253; Kingsbury v. Milner, 69 Ala. 502; Stoudenmire v. DeBardelaben, 72 Ala. 300; Shackelford v. Bankhead, Ib. 477; Yonge v. Hooper, 73 Ala. 119; Massey v. Modawell, Ib. 422; Conner v. Smith, 74 Ala. 115; Goodlet v. Kelly, Ib. 214; Gilmer v. Wallace, 75 Ala. 220.

Feb. 23, 1881, p. 66.

3592. Causes may be referred to arbitration.—By agreement in writing filed with the register in vacation, or by an entry on the minutes in term time, the parties may refer a cause to an arbitrator of their selection, for final decree. The arbitrator must certify the decree, when rendered, to the register, and the register must enter it on the minutes of the court. Such decree shall have the force and effect of a decree rendered by the chancellor; and therefrom an appeal may be taken to the supreme court, as from other final decrees in chancery.

3593 (3897). **Orders and decrees by consent.**—Chancellors may make orders and render final decrees at any time by consent of parties or their counsel.

Lewis v. Lewis, Minor, 35; Erwin v. Reese, 54 Ala. 589.

3594 (3898). **Liens and priority of decrees.**—Executions issued on decrees of a court of chancery, for payment or recovery of money, are liens upon real and personal property subject to execution, from their delivery to the officer, in the same manner and to the same extent, and the rules as to the priority of liens from such court are the same, as in courts of law.

3595 (3899). **Decrees for conveyances and releases operate as such; executed by commissioner.**—When a decree is made for a conveyance, release, or acquittance, and the party against whom the decree is made does not execute the same by the time specified in the decree, such decree operates in all respects as fully as if the conveyance, release, or acquittance, was made; or the court may decree, in default of the execution of such conveyance, release, or acquittance, the same to be executed by the register or a commissioner in the name of the party; and the conveyance, release, or acquittance, when so executed, is as valid in all respects as if executed by the party.

Feb. 23, 1881, p. 64.

3596. Protection of tenant having crop planted on lands decreed to be sold.—A tenant or occupant of lands ordered or decreed to be sold by the court of chancery, having a crop planted or growing on such lands, or about being planted, may retain possession until the expiration of the current year, on securing to the purchaser the payment of the reasonable rent; such rent must, before or after the sale, be ascertained and determined by the chancellor, and the tenant or occupant must enter into bond in a sum equal to double the amount of such rent, payable to the register, and by him approved, with sufficient surety, and with condition for the payment of such rent to the purchaser on

the expiration of the year; and if, on the expiration of the year, such rent, or any part thereof, is not paid to the purchaser, such bond has the force and effect of a judgment, and execution may be issued thereon by the register against any or all the obligors in such bond, for so much of such rent as remains unpaid.

3597 (3900). **Costs at discretion of chancellor.**—Costs may be apportioned at the discretion of the chancellor; and in all cases where costs are decreed against any party who has given security for the costs, execution may issue against such security.

Hunt v. Lewis, 4 Stew. & Port. 138; May v. Eastin, 2 Port. 414; Richardson v. Richardson, 4 Port. 467; Randolph v. Rosser, 7 Port. 249; Alexander v. Alexander, 5 Ala. 517; Gray v. Gray, 15 Ala. 779; s. c., 16 Ala. 649; Bryan v. Bryan, 34 Ala. 516; Blum v. Mitchell, 59 Ala. 535; Kitchell v. Jackson, 71 Ala. 557; Allen v. Lewis, 74 Ala. 379; Falkner v. Campbell, Ib. 360; Rosser v. Timberlake, 78 Ala. 162; State v. City Council, 74 Ala. 226.

3598 (3901). **Decrees enforced by attachment or sequestration.**—Courts of chancery may also enforce their decrees, orders and rules by process of attachment against the party or officer in contempt, or by process of sequestration against his property.

3599 (3902). **Decree for performance of some act to prescribe time.**—If a decree is for the execution of a conveyance, the delivery of deeds, or any other specified act, the decree must, in all such cases, prescribe the time within which such act is to be performed.

3600 (3903). **Sales to be made by register.**—When any property is ordered to be sold by the decree of any chancery court for the satisfaction of any debt secured by any mortgage or deed of trust, such sale shall in all cases be made by the register of the court ordering the same.

Haralson v. George, 56 Ala. 295.

3601 (3904). **Attachment on affidavit of failure to perform.**—Upon an affidavit being filed with the register by the party entitled to have such act done, his agent, or solicitor, stating that the decree of the court has not been performed, the register must issue an attachment against the delinquent party, upon which he may be arrested and committed to jail until he performs such act, or he is discharged by a special order of the chancellor extending the time for the performance; and if such act is not performed within the time as extended, another attachment may issue on the affidavit of the party, his agent, or solicitor.

3602 (3905). **If attachment not executed, sequestration follows.**—Upon the issue of an attachment, if the delinquent cannot be found, a writ of sequestration may issue against the estate of such party to compel obedience to the decree.

3603 (3906). **Decrees; how enforced.**—Courts of chancery are authorized to issue such process, mesne and final, as has been used in such courts; and all writs for the collection of money, to obtain the possession of land or personal property, in use in the common law courts, are to be adapted to the execution of decrees in the courts of chancery.

Thompson v. Campbell, 57 Ala. 183; Kemp v. Lyon, 76 Ala. 212; Hooper v. Yonge, 69 Ala. 484; Johnston v. Smith, 70 Ala. 108.

3604 (3907). **Return day of such process.**—Writs from the court of chancery for the collection of money, or to obtain the possession of lands or personal property, may be made returnable on the first Monday of a month, to be specified in the writ; all other process, as the chancellor or register may direct, unless the return is fixed by law.

Brevard v. Jones, 50 Ala. 222.

3605 (3908). **Execution on decrees for enforcement of liens.**—In all cases when an account is taken between the parties, execution as at law may issue for the amount of indebtedness ascertained by the decree of the court; and in all foreclosure suit, or suits for the enforcement of equitable liens, execution may issue for the balance found due after a sale of the property ordered and decreed to be sold.

Winston v. Browning, 61 Ala. 80; Tedder v. Steele, 70 Ala. 347; Sayre v. Elyton Land Co., 73 Ala. 87.

3606 (3910, 3911). **Decree on partition.**—A final decree of partition is operative to vest title, though releases or conveyances are not executed.

3607 (3912). **Forthcoming bond.** — When the sale of any personal property is decreed, the register, or other person directed to make such sale, may take from the defendant a forthcoming bond, in double the amount of the property, in no case to exceed double the amount of the decree, for the delivery of such property on the day of sale.

3608 (3913). **Effect of forfeiture.**—If the property is not delivered, such register, or person directed to make such sale, must return the bond "forfeited," in which case the bond shall have the force of a judgment; and execution may issue against all the obligors of such bond.

3609 (3914). **Sheriff liable for failure to collect money.** For failing to collect money on any execution from the court of chancery, the sheriff and his sureties, or any or either of them, are liable to the same penalties, to be recovered in the same manner as on failure to collect execution from the law courts; the motion to be made by the plaintiff in the circuit court of the county in which the court from which the execution issues is held.

3610 (3915). **Rules of practice adopted by supreme court.** All the rules now in force, which have been adopted by the supreme court, not contrary to the provisions of this title, are recognized; and power is granted to such court to adopt such other rules to regulate the practice of the court of chancery, or such modifications of the existing rules as they may deem proper, and also to furnish forms of proceeding, to mould the process of the chancery court, and to prescribe rules of evidence in the same, from time to time, as experience may determine that the existing rules do not fully meet the ends of public justice.

Ex parte P. & M. Ins. Co., 50 Ala. 390; Ex parte Branch, 63 Ala. 383.

TITLE V.

APPEALS.

CHAPTER 1.—From what judgments, orders and decrees appeals lie.
2.—Manner and time of taking appeals.
3.—Special provisions relating to appeals from court of probate.
4.—Rules of practice in supreme court on appeals.

CHAPTER 1.

FROM WHAT JUDGMENTS, ORDERS AND DECREES APPEALS LIE.

3611 (3916). **Appeals to supreme court on all final judgments.**—From any final judgment or decree of the chancery, circuit, city, or probate court, except in such cases as are otherwise directed by law, an appeal lies to the supreme court, for the examination thereof, as matter of right, on the application of either party, or his personal representatives; and the clerk, register, or judge of probate, must certify the fact that such appeal was taken, and the time when, as part of the record, which gives the supreme court jurisdiction of the case.

What a final judgment at law sustaining an appeal.—Etheridge v. Hall, 7 Port. 47; Withers v. State, 36 Ala. 252; Albritton v. Canterberry, 44 Ala. 290; Lapsley v. Weaver, Ib. 131; Ex parte Morris, Ib. 361; James v. Moseley, 47 Ala. 299; Ex parte Hendree, 49 Ala. 360; Jones v. Calloway, 56 Ala. 46; Ex parte Gilmer, 64 Ala. 234; Kendall v. Lassiter, 68 Ala. 181; Collins v. L. & N. R. R. Co., 70 Ala. 533; Ex parte Southern Tel. Co., 73 Ala. 564; M. & C. R. R. Co. v. Whorley, 74 Ala. 264. **When judgment not final.**—Mabry v. Dickens, 31 Ala. 243, Guilford v. Hicks, 36 Ala. 95; Davis v. You, 43 Ala. 691; Bray v. Laird, 44 Ala. 295; Lawson v. Moore, Ib. 274; Montevallo C. M. Co. v. Reynolds, Ib. 252; Overton v. State, 60 Ala. 73; Kinney v. S. & N. R. R. Co., 73 Ala. 536; Wagnon v. Keenan, 77 Ala. 519; Tannenbaum v. Tankersly, 52 Ala. 489. **Judgments granting or refusing new trials cannot be reviewed on appeal.**—Benje v. Creagh, 21 Ala. 151; Walker v. Blassengame, 17 Ala. 810; Walker v. Hale. 16 Ala. 26; Martin v. Huggins, 23 Ala. 775; Ketchum v. Dennis, 41 Ala. 183; Lockhart v. Wyatt, 42 Ala. 31; Callahan v. Lott, Ib. 167; Carroll v. Vaughan, 48 Ala. 352; Bedwell v. Bedwell, 77 Ala. 587. **Appeal lies from order refusing a rehearing under the statute.**—White v. Ryan, 31 Ala. 400; Elliott v. Cook, 33 Ala. 490; Lawson v. Moore, 45 Ala. 519; Ex parte North, 49 Ala. 385. But see Trabue v. Davis, 78 Ala. 369. **But not from an order granting a rehearing.**—Callahan v. Lott, 42 Ala. 167; Ex parte North, 49 Ala. 385; Carroll v. Vaughan, 48 Ala. 352; Fuller v. Boggs, 49 Ala. 127; Heflin v. Rock Mills, 58 Ala. 613; O'Neal v. Kelly. 72 Ala. 559; Bruce v. Williamson, 50 Ala. 313; Ex parte Walker, 54 Ala. 577; Ex parte Wallace, 60 Ala. 267. But see Shields v. Burns, 31 Ala. 535; Dothard v. Teague, 40 Ala. 583. **When decree of probate final.**—Andrews v. Hall, 15 Ala. 85; McDaniel v. Whitman, 16 Ala. 343; Bartal v. Calvert 21 Ala. 42; Hollis v. Caughman, 22 Ala. 478; May v. May, 28 Ala. 141; Cawlfield v. Brown, 45 Ala. 552; Field v. Gamble, 47 Ala. 443; Bruce v. Strickland, Ib. 192; Spence v. Parker, 57 Ala. 196. **When such decree not final.**—Stewart v. Price, 16 Ala. 40; Devaney v. Devaney, 25 Ala. 722; Mathews v. Hobbs, 51 Ala. 210; Trammell v. Trammell, 50 Ala. 39; Bond v. Marx, 53 Ala. 177; Carswell v. Spencer, 44 Ala. 204. **Void judgment will not support an appeal.**—Garrison v. Burden, 40 Ala. 513; Hays v. Cockrell 41 Ala. 75; Ex parte Boynton, 44 Ala. 261. **What a final decree in equity.**—Bank v. Hall, 6 Ala. 141; Brooks v. Woods, 40 Ala. 538; Lehman v. Ford, 47 Ala. 733; Tabor v. Lorance, 53 Ala. 543; Jones v. Wilson, 54 Ala. 50; Smith v. Coleman, 59 Ala. 260; Malone v. Marriott, 64 Ala. 486; Hastie v. Aiken, 67 Ala. 313; Walker v. Crawford, 70 Ala. 567; Cochran v. Miller, 74 Ala. 50; May v. Green, 75 Ala. 162; Adams v. Sayre, 76 Ala. 509. **What is not.**—Garner v. Prewitt, 32 Ala. 13; Broughton v. Wimberly, 65 Ala. 550; Moore v. Randolph, 52 Ala. 530; Parish v. Galloway, 34 Ala. 163; Benford v. Daniels, 20 Ala. 445. Rase v. Gibson, 71 Ala. 36; Stringfellow v. Ivie, 73 Ala. 209; Randle v. Boyd,

Ib. 282. **What not subject of assigned error.**—Voltz v. Voltz, 73 Ala. 556. **Two distinct judgments cannot be united in one appeal.**—Scranton v. Ballard, 64 Ala. 402. **Parties to appeal.**—Cullom v. Batre, 1 Ala. 126; Savage v. Walch, 24 Ala. 293; Riddle v. Hanna. 25 Ala. 484; Moore v. McGuire, 26 Ala. 461; England v. McLaughlin, 35 Ala. 590; Harper v. Bibb, 45 Ala. 670; May v. Courtney, 47 Ala. 185; Miller v. Parker, Ib. 312; Alexander v. Rea, 50 Ala. 64; Millsap v. Stanley, Ib. 319; Thompson v. Campbell, 52 Ala. 583; s. c., 57 Ala. 183; Huckabee v. Nelson, 54 Ala. 12; Ex parte Brown, 58 Ala. 536; Hunt v. Houtz, 62 Ala. 36; Vaughan v. Higgins, 68 Ala. 546; Hodnett v. C. R. R. Co., 68 Ala. 562.

3612 (3918). **Appeals from certain interlocutory decrees.** From any decree rendered by the chancery court in term time, or by the chancellor in vacation, sustaining or overruling a demurrer to a bill in equity, or sustaining or overruling a plea to such bill, or sustaining or overruling a motion to dismiss such bill for want of equity, an appeal lies to the supreme court, to be taken within thirty days after the rendition of such decree; the appeal shall be heard and determined by the supreme court in preference to all other than criminal cases, and if the decree of the chancellor is reversed, the court shall render such decree as should have been rendered by the chancellor; but nothing in this section shall be so construed as to prevent an assignment of errors on such decrees, on appeals taken after the final determination of the cause, if appeals are not taken under this section

Thornton v. Kyle, 46 Ala. 379; Ex parte Thornton, Ib. 384; Morgan v. Jones, 48 Ala. 250; Winn v. Dillard, 60 Ala. 369; s. c., 57 Ala. 167.

3613 (3922). **Appeals on orders sustaining or dissolving injunctions.**—An appeal lies to the supreme court on all interlocutory orders, in term time or vacation, sustaining or dissolving injunctions, which must be heard and determined at the first term after the appeal is taken, or if the supreme court is in session when such appeal is or has been taken, then the same shall be heard during such session, at least three days' notice of the appeal having been first given to the adverse party.

Pearson v. Darrington, 21 Ala. 169; Powell v. Central Co., 24 Ala. 441.

As amended, Dec. 10, 1878, p. 78.

3614 (3921). **Appeal from order appointing or refusing receiver.**—An appeal lies from an order of the chancellor, made in term time or in vacation, appointing or refusing to appoint a receiver, within thirty days from the filing of the order with the register; and such appeal must be taken and deemed by the supreme court as a preferred case, and must be heard during the term to which it is returnable in preference to all other than criminal cases, or other preferred cases having priority on the docket of the court.

3615 (3917). **Appeals from certain interlocutory judgments.**—An appeal to the supreme court may be taken, before the final determination of the cause, from any judgment overruling a motion to dismiss or quash an attachment, or sustaining a demurrer to a plea in abatement to an attachment, or sustaining an attachment against matters set up in abatement of it, either in the way of an agreed case, or by plea, or otherwise; but such appeal shall be taken only after the consent of the opposite party, or his attorney, is obtained to its being taken; and on the trial of such appeal, there shall not be a reversal, if the supreme court discovers that the defect or error alleged or insisted on can be removed or remedied by amendment.

Crumley v. Bryan, 69 Ala. 91.

3616 (3923). **Appeals from denial of remedial writs.**—Appeals may be taken to the supreme court from the judgment of judges of the circuit and city courts on application for writs of certiorari, supersedeas, quo warranto, mandamus and other remedial writs, upon plaintiff or defendant giving security for the costs of appeal, approved by the judge trying the same, within sixty days from the day of the judgment; but such appeal shall not operate as a supersedeas of the judgment, unless bond with sufficient sureties be given by the appellant, payable to the appellee, in such sum as the judge hearing the application shall require, conditioned to pay all damages thereby sustained.

Ex parte Candee, 48 Ala. 386; Thompson v. Holt, 52 Ala. 497; Ex parte City Council, 64 Ala. 463.

3617 (3924). **Application, etc., filed in clerk's office; manner of taking appeal.**—When any application mentioned in the foregoing section has been acted upon by any judge of the circuit or city court, such judge shall cause the application, together with his order thereon, and the other papers in the cause, to be filed in the office of the clerk of the circuit or city court of the county where the application is heard, and such clerk shall prepare the transcript thereof, and certify the appeal as in other cases.

3618 (3919, 3920). **Appeals from judgments or decrees of abolished courts.**—If an inferior court of record ceases to exist by reason of the repeal of the statute creating it, and, while existing, rendered a judgment or decree from which an appeal would lie, within the time prescribed by law, an appeal therefrom may be taken on application to the clerk or register of the court to which the unfinished business, or the records of such inferior court, may be transferred, as if such judgment or decree had been rendered in the court having the jurisdiction of such unfinished business, or the custody of such records; and in the event of the reversal of such judgment or decree, the remandment of the cause must be to the latter court.

CHAPTER 2.

TIME AND MANNER OF TAKING APPEALS.

3619 (3949). **Limitation of appeals.**—Appeals under this title, except in such cases as a different time is prescribed, must be taken within one year from the rendition of the judgment or decree. As amended, Feb. 13, 1879, p. 40.

Andrews v. Branch Bank, 10 Ala. 375; Pearson v. Darrington, 21 Ala., 169; Cawlfield v. Brown, 45 Ala. 552; Jones v. Wilson, 54 Ala. 50; Ala. C. & N. Co. v. State, 54 Ala. 36; Waldrop v. Carnes, 62 Ala. 374; Lanier v. Russell, 74 Ala. 364.

3620 (3925). **When appeal returnable.**—Unless otherwise provided, an appeal to the supreme court, if taken in vacation, is returnable to the next ensuing term; but if taken during the term, must be made returnable to the first Monday of the term next after the expiration of twenty days from the date of the appeal.

Shulman v. Brantley, 48 Ala. 193; Rogers v. Abercrombie, Ib. 466; Winn v. Dillard, 60 Ala. 369; Robinson v. Murphy, 69 Ala. 543; Webb v. Robbins, 77 Ala. 176.

Dec. 10, 1878, p. 78.

3621. Return of appeal from order appointing or refusing receiver.—If an appeal is taken from an order appointing or refusing to appoint a receiver during the term of the supreme court, it must be made returnable to the first Monday succeeding the taking thereof, to which ten days' notice of the appeal can be given; otherwise, the appeal must be taken to the next succeeding term of the court.

3622 (3950). **Security for costs; when required.**—No appeal can be taken without giving bond to supersede the execution of the judgment or decree, unless the appellant give security for the costs of such appeal, to be approved by the clerk, register, or judge of probate; the names of the surety or sureties to be certified with the record to the appellate court; and execution may issue against such sureties for the costs in such court and the costs of the transcript, if decided against the appellant.

Spencer v. Thompson, 24 Ala. 512; Riddle v. Hanna, 25 Ala. 484; Carey v. McDougald, Ib 109; Hinson v. Preslor, 27 Ala. 643; Crump v. Wallace, Ib. 277; Williams v. McConico, Ib. 572; Walker v. Hunter, 34 Ala. 204; Barnett v. State, Ib. 260; England v. McLaughlin, 35 Ala. 590; McCollum v. McCollum, 33 Ala. 711; Davis v. McCampbell, 37 Ala. 609; Marshall v. Croom, 50 Ala. 479; Montgomery Gas-Light Co. v. Merrick, 61 Ala 534.

3623 (3927). **Supersedeas bond.**—When the judgment or decree is for the payment of money only, the appeal does not operate as a supersedeas, or to stay or suspend the execution of such judgment or decree (except in such cases as are otherwise provided), unless bond be given by the appellant, or some other person, in double the amount of the judgment or decree, including costs, payable to the appellee, with sufficient sureties, and with condition to prosecute the appeal to effect, or, if he fails therein, to satisfy such judgment as the supreme court may render in the premises.

Powell v. Central Co., 24 Ala. 441; Moore v. McGuire, 26 Ala. 463; Dumas v. Hunter, 28 Ala. 688; s. c., 30 Ala. 188; Childress v Taylor, 33 Ala. 185; Burdine v. Mustin, Ib. 634; Espy v. Balkum, 45 Ala. 256; Cullen v. Lee, 50 Ala. 494; Thompson v Campbell, 52 Ala. 583; Ex parte DuBose, 54 Ala. 278; Hughes v. Hatchett, 55 Ala. 539; State v. City Council, 74 Ala. 226; Ex parte Sibert, 67 Ala. 349.

3624 (3928). **Supersedeas bond when judgment or decree for payment of money, and for other acts.**—If the decree or judgment be for the payment of money, and also for the performance of some act or duty, or for the recovery of property, real or personal, or the possession thereof, or for the sale of property, real or personal, and the party appealing wishes to supersede the execution of such judgment or decree, he must, unless otherwise provided, give bond with good and sufficient sureties, payable to the party recovering the judgment or decree, in double the amount of the money, with condition to prosecute to effect the appeal, or, if he fails therein, to pay such judgment as the supreme court may render in the premises, and must also execute bond with good and sufficient sureties, payable to the clerk or register, in such sum as the judge or chancellor may in writing prescribe, with condition to pay all such costs and damages as any party aggrieved may sustain by reason of the wrongful appeal and suspension of the execution of the judgment or decree; or if the party appealing wishes to supersede the judgment or decree as to the payment of the money only, the bond first above mentioned may be executed,

suspending the judgment or decree in that respect only; or if the party appealing wishes to supersede the execution of the judgment or decree in the other respect only, the bond secondly above mentioned may be executed, superseding the execution of the judgment or decree in that respect only.

Hughes v. Hatchett, 55 Ala. 539; Montgomery Gas Co. v. Merrick, 61 Ala. 534; Steele v. Tutwiler, 63 Ala. 368; Drake v. Webb, Ib. 596; Clark v. Knox, 65 Ala. 401; Ex parte Sibert, 67 Ala. 349; Cahall v. Citizens' M. B. Asso'n, 74 Ala. 539.

3625 (3928). **Supersedeas bond in other cases.**—If the decree or judgment be only for the performance of some act or duty, or for the recovery of property, real or personal, or the possession thereof, or for the sale of property, real or personal, unless otherwise provided, the party appealing, if he wishes to supersede the execution of the judgment or decree, must execute bond with good and sufficient sureties, payable to the clerk or register, in such sum as the judge or chancellor may in writing prescribe, with condition that if he fail in the appeal he will pay such judgment as the supreme court may render in the premises, and all such costs and damages as any party aggrieved may sustain by reason of the wrongful appeal and suspension of the execution of the judgment or decree.

See citations to preceding section.

3626 (3928). **Order of judge or chancellor filed and recorded.**—The order of the judge or chancellor, fixing the amount of the bonds mentioned in the two preceding sections, must be filed and entered by the clerk or register on the minutes of the court; but the failure to make such order, or if made, to file, or to record the same, shall not impair the validity or obligation of any bond which is given as a security under the two preceding sections, by which an appeal and a suspension of execution are in fact obtained.

3627 (3934). **Bond on appeal by claimant in trial of right of property.**—When an appeal is sued out by the claimant on a judgment against him on a trial of the right of property, and he desires to supersede the judgment, the bond must be taken in double the amount of the plaintiff's judgment, if that, with the interest, is less than the valuation by the jury of the property levied on, and in double the amount of the assessed value, if less than the judgment of the plaintiff.

3628. Bond or security for costs on appeal from order appointing receiver.—If an appeal is taken from an order appointing a receiver, and it is intended to supersede such order, the party taking the appeal must enter into bond with good and sufficient sureties, payable to and approved by the register, in such sum as may be prescribed by the chancellor or register, with condition to prosecute such appeal to effect, or, if he fail therein, to pay the costs thereof, and all such damages as any person in interest may sustain from the suspension of such order during the pendency of such appeal; but if it is not intended to supersede such order, or if the appeal is taken from an order refusing the appointment of a receiver, security for the costs only must be taken. Dec. 10, 1878, p. 78.

3629 (3930). **When married women relieved from giving bond or security for costs.**—From any judgment of the circuit or city court, or from any order or decree of the court of

probate, or from any decree of the court of chancery, subjecting to sale the separate estate of a married woman, or any part thereof, be the same her statutory separate estate, or a separate estate otherwise created, she is entitled to an appeal to the supreme court to revise such judgment, order, or decree, without giving security for costs of appeal, on making affidavit that she is unable to give such security; and such appeal shall operate as a suspension and stay of all proceedings under such judgment, order, or decree, until such appeal shall have been heard and determined by the supreme court.

Coleman v. Smith, 52 Ala. 259; Armstrong v. Nelson, 57 Ala. 556; Ware v. McDonald, 62 Ala. 81; Roberts v. Taylor, 64 Ala. 549; Cahalan v. Monroe, 65 Ala. 254.

3630 (3929). **Liability for taking insufficient surety on appeal bond.**—For taking insufficient surety, the clerk, register, or judge of probate, is liable to the appellee for the damages thereby sustained, unless the surety was generally reputed good for the amount when he was received; but the clerk, register, or judge of probate, is not required to receive any one as surety, who refuses to answer on oath as to his sufficiency.

3631 (3926). **Citation on appeal.**—Upon an appeal being taken, the register, or clerk of the circuit or city court, or the judge of probate, must issue a citation to the adverse party, returnable to the day to which the appeal is returnable, notifying him of the appeal, which must be served on him, or his attorney, or solicitor, for at least ten days (unless otherwise provided) before the day to which the appeal is returnable.

Harris v. Harris, 41 Ala. 365; Shulman v. Brantly, 48 Ala. 193.

Dec. 10, 1878, p. 78.

3632. Notice of appeal from order appointing or refusing receiver.—Notice of an appeal from an order appointing or refusing to appoint a receiver must be given by citation to the adverse party, which must be served on him, or his solicitor of record, ten days at least before the return day thereof.

3633 (3944). **Notice to appellee when non-resident.**—When the appellee is a non-resident and has no attorney or agent within the state to receive notice of the appeal, oath in writing being made of the fact, the supreme court may direct notice to be given by publication, which is as effectual as actual notice.

3634 (3933). **Appellant to have transcript of record and certificate of appeal and citation.**—The register, clerk, or judge of probate, must, on the application of the appellant or his attorney, make and deliver to him in time to be returned to the supreme court, a full and complete transcript of the record and proceedings in the cause, together with his certificate that the appeal was taken, and the time when, and when returnable, and the citation and a copy of the appeal bond, if any was given, with his certificate that it is a complete transcript of all the proceedings in the cause, and envelope and seal up the whole in a package directed to the clerk of the supreme court, or deliver it to the attorney applying for the same.

Contents of transcript.—Butler v. State, 22 Ala. 44; Montevallo Co. v. Reynolds, 44 Ala. 252; Brigman v. State, 46 Ala. 72; Barr v. Collier, 54 Ala. 39; Lake v. Security Asso'n, 72 Ala. 207; Pinney v. Werborn, Ib. 58; Life Asso'n v. Neville, Ib. 517; Lipscomb v. McLellan, Ib. 151; Hays v. Woods, Ib. 92; Weaver. v. Cooper, 73 Ala. 318; Rosette v. Wynn, Ib. 146; Allred v, Kennedy, 74 Ala. 326; Pruitt v. McWhorter, Ib. 315; Foster v. Napier, Ib. 393; Lehman v. Dozier, 78 Ala.

235. **Certificate.**—Bishop v. State, 30 Ala. 34; Armstrong v. Nelson, 57 Ala. 556; Harris v. Harris, 41 Ala. 365. **Certiorari.**—A. & M. R. R. Co. v. Hungerford, 41 Ala. 388; Townsend v. Jeffries, 24 Ala. 329; Portis v. Newman, 43 Ala. 506; Caldwell v. Baldwin, Ib. 617; Morgan v. Jones, 48 Ala. 250; Curry v. Woodward, 50 Ala. 258; Tuskaloosa Co. v. Logan, Ib. 503; Stroud v. State, 55 Ala. 77; Bell v. State, 74 Ala. 420; Ross v. State, Ib. 532.

3635 (3939). **When the transcript to be filed.**—If the appeal is returnable to the next ensuing term of the supreme court, the transcript of the record must be filed therein on or before the third day of such term; if the appeal be returnable to a Monday of the term, the transcript must be filed on or before the day to which the appeal is returnable. In either case, the citation or notice of appeal must accompany the transcript.

Owen v. Echols, 28 Ala. 689; Carleton v. Goodwin, 41 Ala. 153; Alexander v. Nelson, 42 Ala. 462.

3636 (3937). **Liability of clerk for delay in furnishing transcript, or for imperfection in record.**—If, by reason of negligence or delay of the clerk, the transcript be not delivered to the appellant or his attorney in time to be filed, or if the transcript be so defective that the supreme court cannot proceed thereon, the clerk forfeits to the party aggrieved the sum of two hundred dollars, and is further liable to him, in an action on the case, for all damages sustained by his neglect or delay.

3637 (3938). **Certificate of appeal given appellee.**—When an appeal is taken, the clerk, register, or judge of probate, must, on the application of the appellee, make and deliver to him a certificate of the judgment or decree upon which the appeal has been taken, specifying particularly the judgment or decree, the amount of the same, if for money, the parties thereto, and when rendered, and that an appeal has been taken thereon, with a statement of the obligors in the bond to supersede the judgment or decree, if one has been given, or of the sureties for costs.

Armstrong v. Nelson, 57 Ala. 556.

3638 (3948). **Appeals on death of either party after judgment.**—When either party to a judgment or decree dies after judgment or decree rendered, and before appeal taken thereon, an appeal may be prosecuted in the name of, or against the legal representative of the deceased, on producing satisfactory evidence to the clerk, judge of probate, or register, of the death of the party, and grant of letters testamentary or of administration.

Morrow v. Taggart, 45 Ala. 293.

3639 (3952). **Clerks of inferior courts may issue executions for costs unpaid.**—Clerks of the circuit or city court, registers in chancery, and judges of probate, when cases have been taken from their respective courts to the supreme court by appeal, or other lawful mode, and been there decided, if the costs accruing in such lower courts for transcripts, or otherwise, be not paid by the parties against whom they were adjudged in the supreme court, may issue executions for such costs, returnable into the court in which such costs accrued.

CHAPTER 3.

SPECIAL PROVISIONS RELATING TO APPEALS FROM COURT OF PROBATE.

3640 (3957). **Final decree.**—An appeal lies to the circuit or supreme court from any final decree of the court of probate, or from any final judgment, order, or decree of the judge of probate; and in all cases where it may of right be done, the appellate court shall render such decree, order, or judgment as the court of probate, or the judge thereof, ought to have rendered.

See citations to section 3611.

3641 (3954). **Other cases in which an appeal lies.**—Appeals from the decrees of the court of probate, or from the order, judgment, or decree of the judge of probate, may be taken by the party aggrieved to the circuit or supreme court, in the cases and within the time hereinafter specified, under the same rules and regulations which govern other appeals.

1. From the decree or judgment on a contest as to the validity of a will, to be taken within thirty days after the determination of the contest.

2. On application, and claiming the right to execute a will, or to administer on an estate, to be taken within thirty days after the hearing and decision of such application, unless the application was denied because the applicant was deemed unfit to serve by reason of a conviction of an infamous crime, or by reason of improvidence, intemperance, or want of understanding, in which case the appeal must be taken within ten days from the denial of the application.

3. Upon any judgment or order removing an executor or administrator, in which case the appeal must be taken within five days after such judgment or order.

4. By a legatee or person entitled to distribution, on the decision of the court, in proceedings instituted to compel the payment of a legacy or distributive share, at any time within six months after such decision.

5. After a final settlement, upon any order, decision, or decree, made on such settlement, or respecting any item or matter thereof, or on any previous settlement, or item, or matter thereof, within six months thereafter.

6. Upon any issue as to the insolvency of an estate, and upon any issue as to an allowance of any claim against insolvent estates, in which cases the appeal must be taken within thirty days after the determination of such issue.

7. On an application for a division or partition of real or personal property, in which case the appeal must be taken within six months, and the decree may be superseded, upon the execution within fifteen days of a supersedeas bond, payable to the appellee, in an amount and upon condition to be prescribed by the judge of probate, such supersedeas to continue until the appeal is decided.

Subdivision 1.—Glover v. Lyon, 57 Ala. 365; Lanier v. Russell, 74 Ala. 364. **Subdivision 3.**—Holtzclaw v. Ware, 34 Ala. 307. **Subdivision 5.**—Smith v. Smith, 30 Ala. 642; Stewart v. Price, 16 Ala. 40; Howard v. Howard, 26 Ala. 682; Williams v. Gunter, 28 Ala. 681; Thomas v. Dumas, 30 Ala. 83; McAllister v. Thomp-

son, 32 Ala. 497; Bruce v. Strickland, 47 Ala. 192. **Subdivision 6.**—Nooe v. Garner, 70 Ala. 443 **Subdivision 7.**—Hoard v. Hoard, 41 Ala. 590; McDade v. McDade, 56 Ala. 598.

3642 (3963). **Appeals from circuit to supreme court.**—An appeal may be taken from the judgment of the circuit court on an appeal brought to such court, under the provisions of this chapter, to the supreme court, within thirty days after such judgment.

3643 (3958). **Appeal to supreme court on change of venue in contest of will.**—Upon the contest of a will removed from the probate court of the county in which it was propounded to the probate court of another county for trial, an appeal lies to the supreme court, and must be taken within thirty days after the judgment.

Seale v. Chambliss, 35 Ala. 19.

3644 (3964). **No appeal from order removing executor or administrator without bond.**—No appeal can be taken from any order of the probate court removing an executor or administrator, unless the appellant gives bond with at least two good and sufficient sureties, payable to the judge of probate, and in an amount to be fixed by him, not less than the amount of his bond as executor or administrator, conditioned to prosecute the appeal to effect, and, until the same is decided, faithfully to discharge his duties as such executor or administrator.

3645 (3965). **On affirmance, execution against principal and sureties on bond.**—If such appeal is decided against the appellant, execution for costs may issue against him and the sureties on such bond; their names being certified with the record to the appellate court.

3646 (3966). **Bond also security for estate.**—Such bond also stands as security for the faithful discharge of his duties as such executor or administrator, from the time the same is approved until the appeal is finally decided.

3647 (3967). **Security for costs to be given in appeals.**—In all other cases in which an appeal is taken under the provisions of this chapter, the appellant, or some one for him, must give security for the costs of such appeal, to be approved by the judge of probate, or the clerk of the circuit court, as the case may be; and the names of such sureties must be certified with the record to the appellate court; and if the appellant fails to prosecute his appeal, or the judgment is not reversed, or is rendered against him for a less amount, execution may issue against him and such sureties for the costs.

3648 (3959, 3960). **Bill of exceptions.**—Either party may, by bill of exceptions, reserve any charge, opinion, ruling, or decision of the court, or of the judge, touching the matter of controversy, which would not otherwise appear of record; such bill to be signed by the judge within ten days after the entry of the decree or judgment; and, when signed, becomes part of the record.

Williams v. Gunter, 28 Ala. 681; Reese v. Gresham, 29 Ala. 91; Lovett v. Chisolm, 30 Ala. 88; Harris v. Dillard, 31 Ala. 191; Turner v. Key, Ib. 202; Dunham v. Hatcher, Ib. 484; Bartee v. James, 33 Ala. 34; Seale v. Chambliss, 35 Ala. 19; Jones v. Jones, 42 Ala. 218; Tapp v. Cox, 56 Ala. 553; Jaques v. Horton, 76 Ala. 240.

3649. Transcript of record.—If the error complained of arises only in the matter of the bill of exceptions, the transcript thereof certified to the appellate court need contain only the bill of exceptions and the decree, order, or judgment.

3650 (3961). **Judgment thereon.**—If it appears from the bill of exceptions that all the evidence in relation to the particular matter is set out, the appellate court may reverse and render such judgment, order, or decree, touching such matter, as should have been rendered, or may remand generally, or may remand with directions to enter the proper judgment, order, or decree.

3651 (3968). **Minors; non compos mentis.**—The next friend or general guardian of a minor, or of a person of unsound mind, may, in the name of such minor or person of unsound mind, take and prosecute an appeal from any final decree of the court of probate, or from any judgment, order, or decree of the judge of probate, on giving security for the costs of the appeal; but a guardian ad litem may take and prosecute an appeal without giving any security for costs of the appeal.

3652 (3969). **Costs of appeal.**—The costs of an appeal, when paid by an executor, administrator, guardian, or guardian ad litem, or next friend, or an administrator ad litem, may, in the discretion of the judge of probate, be reimbursed from the estate of the testator, or intestate, or infant, or person of unsound mind.

CHAPTER 4.

PROCEEDINGS IN SUPREME COURT ON APPEAL.

3653 (3931). **Amendment of appeal.**—An appeal must not be dismissed because of any error, mistake, or irregularity in the taking thereof, or because of any defect in the certificate; but on motion all such amendments as are necessary to perfect it must be allowed.

Harper v. Bibb, 45 Ala. 670; Kidd v. Turner, 52 Ala. 251; Thompson v. Campbell, Ib. 583; Alexander v. Rea 50 Ala. 64.

3654 (3932). **Appeal bonds and bonds for costs amendable.** No appeal shall be dismissed for the want of a sufficient appeal bond, or bond for the costs of the appeal, if the appellant will give a sufficient bond, which bond the supreme court, or any member thereof, may take and approve, or it may be taken and certified to the supreme court by the judge, clerk, or register certifying the appeal.

See citations to preceding section.

3655 (3953). **Discontinuance.**—An appeal must not be deemed or treated as discontinued, or as having otherwise lost its force, unless the appellee shall duly move for a discontinuance after legal cause for discontinuance has occurred.

Rhea v. Rhea, 54 Ala. 68; Carleton v. Goodwin, 41 Ala. 153.

3656 (3947). **On death of either party, cause revived.** Upon the death of either party to an appeal being suggested, if

the cause cannot proceed without new parties, the cause may be revived either for or against such party, on the production of letters testamentary or of administration; but citation must issue from the appellate court to all who are thus made defendants, unless they appear and waive it.

3657 (3940). **Judgment of affirmance on certificate.**—If an appeal is taken, and the transcript of the record is not filed within the time prescribed, it is the duty of the court, on the motion of the appellee, to affirm the judgment or decree of the court below, upon the production by him of the certificate of the register, clerk, or judge of probate, that an appeal has been taken to the supreme court. For good cause shown, the court may reinstate the cause during the term, on payment of costs.

Perryman v. Camp, 24 Ala. 438; Pearsall v. McCartney, 25 Ala. 461; Shulman v. Brantley, 48 Ala. 193; Jones v. Mathews, Ib. 558; Dorsey v. Dumas, 50 Ala. 244; Armstrong v. Nelson, 57 Ala. 556.

3658 (3943). **Judgment or decree, if reversed, may be rendered, or cause remanded.**—The supreme court may, upon the reversal of any judgment or decree, remand the same for further proceedings, or render such judgment or decree as the court below should have rendered, when the record enables them to do so.

When cause remanded on reversal.—Wells v. Bransford, 28 Ala. 201; Bondurant v. Sibley, 29 Ala 570; Latham v. Staples, 46 Ala. 462; Childress v. Harrison, 47 Ala. 556; Wilburn v. McCalley, 63 Ala. 436; Parks v. Parks, 66 Ala. 326; Bradford v. Bradford, Ib. 252; Kendall v. Lassiter, 68 Ala. 181; Jones v. Latham, 70 Ala. 164. **When rendered on appeal.**—Evans v. Bell, 20 Ala. 509; Commissioners v. Tarver, 25 Ala. 480; Jackson v. Shipman, 28 Ala. 489; Pike v. Bright, 29 Ala. 332; Campbell v. May, 31 Ala. 567; Griffin v. Wall, 32 Ala. 150; Jean v. Sandiford, 39 Ala. 317; Manning v. Kohn, 44 Ala. 343; Glidden v. Street, 68 Ala. 600; Lehman v. Levy, 69 Ala. 48; Munchus v. Harris, Ib. 506.

3659 (3946). **Clerical errors corrected at appellant's cost.** No cause must be reversed by the supreme court for any miscalculation of interest, or other clerical mistake in entering judgment, but on motion of, and at the cost of the appellant.

Beason v. Riddle, 11 Ala. 743; Windham v. Clarke, 16 Ala. 659; Rambo v. Wyatt, 32 Ala. 363; Smith v. Kennedy, 63 Ala. 334.

3660 (3945). **Confession of judgment releases errors.**—A confession of judgment is in law a release of errors.

Murphree v. Whitley, 70 Ala. 554; McNeil v. State, 71 Ala. 71; Burke v. State, 74 Ala. 399.

3661 (3941). **If bond is filed, ten per cent. damages on affirmance.**—When bond with surety has been executed on an appeal, and the judgment thereby suspended, if the supreme court affirms the judgment of the court below, it must also render judgment against all or any of the obligors in the bond, for the amount of the affirmed judgment, ten per cent. damages thereon, and the costs of the supreme court.

Lawrence v. Jones, 37 Ala. 3.

3662 (3942). **Damages in all cases of money judgments.** The preceding section applies to all cases where a judgment or decree is rendered for money, whether debt or damages.

3663 (3935). **Damages when judgment by claimant in trial of right of property is affirmed.**—When an appeal is taken by the claimant on a trial of the right of property, and the judgment superseded, if the appellate court affirms the judgment of the court below, it must render judgment of ten per cent. on

the assessed value of such property, if less than the amount of the execution against the defendant; if such value exceeds such execution, ten per cent. on the amount thereof, against the obligors in the appeal bond.

3664 (3936). **Damages on affirmance of judgment in detinue.**—Upon the affirmance of a judgment for the recovery of chattels in specie, which has been superseded, the court must render judgment for ten per cent. damages upon the assessed value of the chattels, and upon the damages for the detention thereof.

PART FOURTH.

FEES AND FORMS IN CIVIL CASES.

TITLE I.

FEES.

CHAPTER 1.—General rules applicable to all fees, civil or criminal.
2.—Fees of officers.
3.—Fees of jurors and witnesses.

CHAPTER 1.

GENERAL RULES APPLICABLE TO ALL FEES, CIVIL OR CRIMINAL.

3665 (5017). **No fee charged unless expressly authorized.** The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law.

Lee v. Smyley 16 Ala. 773; Dent v. State, 42 Ala. 514; Dane v. Loomis, 51 Ala. 487; State v. McDuffie, 52 Ala. 4; Tillman v. Wood, 58 Ala. 578; City Council v. Foster, 54 Ala. 62; State v. Brewer, 59 Ala. 130; Kahn v. Locke, 75 Ala. 332.

3666 (5018). **Fee bills posted.**—Clerks of the circuit courts and judges of probate and registers in chancery must keep posted, in a conspicuous place in their respective offices, a complete list of all the fees allowed by law to them and to sheriffs for services connected with their respective courts, and must furnish a copy thereof on application.

3667 (5019). **Penalty for failure to post.**—The clerk of the circuit court, judge of probate, or register in chancery, who fails to comply with the provisions of the preceding section, is not authorized to collect or receive any fee for services rendered during such failure.

3668 (5005, 5011). **When fees due.**—Fees allowed by law are due only at the termination of the suit, except that fees for transcripts of papers filed in the cause, other than copies of bills to which parties are entitled as of course, are due when service is performed; and no fee, except for the final record, shall be demanded or received in any case unless the service has been performed.

3669 (5009). **Sheriff's fees; when due.**—Sheriffs and coroners are not entitled to full commissions until after actual levy of execution on property of the defendant, and the money made

or paid to the plaintiff in execution, and then only on the amount actually collected or paid.

3670 (5010). **When entitled to half commissions.**—When the sheriff or coroner has levied execution, and before sale it is stayed by order of the plaintiff, the officer so levying must receive only half commissions.

Barron v. Tart, 18 Ala. 668.

3671 (5008, 5012). **Bill of costs on request; no fee for taxing.**—All officers entitled to fees or costs must, on demand, make out a bill of such fees or costs, stating each item distinctly, and, except in cases where it is expressly authorized, no fee shall be charged for taxing costs or furnishing a copy of the bill.

3672 (5016). **No commissions on costs.**—No sheriff, coroner, or constable, shall collect or receive commissions on costs taxed in any execution put in his hands. The commissions allowed by law shall be collected or received only on the principal, damages and interest of the execution.

3673 (5014). **When execution against plaintiff for his own costs; penalty for failure to collect, etc.**—The clerk of the supreme court, clerks of the circuit court, judges of probate and justices of the peace, upon return of an execution "no property" against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, of the county from which the case was brought, may issue execution in their own names against the plaintiff for the costs actually created by the plaintiff, but for none other, to be collected and returned as other executions. Judgment may be rendered on motion in the circuit court of such county, in the name of the clerk, or judge of probate issuing the execution, against the sheriff so failing and his sureties, or either of them, upon three days' notice, for failing to return, twenty per cent. upon the amount of the execution; for failing to collect, the amount of the execution and ten per cent. damages; and for failing to pay over, the amount of the execution and five per cent. damages for each month after demand.

Westcott v. Booth, 49 Ala. 182.

3674 (5023). **No charge for keeping indexes.**—The probate judges, clerks of the circuit courts and registers in chancery are prohibited from receiving any fees or allowances out of the county treasury for keeping direct and reverse indexes to books and records required by law.

As amended, Feb. 13, 1879, p. 60, sec. 1.

3675. (5025). **Account for ex officio services itemized and sworn to; maximum of allowance.**—Persons entitled to an allowance by the court of county commissioners for what are commonly called ex officio services, shall, before the allowance is made, itemize such services, and make oath thereto, as in the case of other claims against the county. The compensation allowed shall be the fair and reasonable value of the services, in no case to exceed two hundred dollars per annum.

3676 (5005, 5006). **Clerks, registers and sheriffs keep fee-books.**—The clerks of the circuit courts, registers in chancery and sheriffs must each keep a fee-book, which, in the case of the clerk and register, is a book belonging to the office. Each

such officer must enter therein, in the form of a regular account opened for that purpose, every fee charged by him for every distinct service rendered by him. The fee-book must have an index pointing out the folio of the respective accounts.

3677 (5007). **No fee charged unless entered in fee-book.** No clerk, register, or sheriff, shall demand or receive a fee for any service by him performed, not justified by a charge entered in his fee-book.

3678 (5021). **Judge of probate keeps book showing fees received.** — The judges of probate must keep constantly in their offices, free to public inspection, a book in which must be entered all fees received by virtue of their office, stating for what and from whom received.

3679 (5013). **Quadruple damages for unlawful charge.** Any officer authorized by law to take fees, who knowingly receives any other or higher fees than are prescribed by law, is liable to the party aggrieved for fourfold the fees so received, to be recovered in any court of competent jurisdiction.

Foster v. Blount, 18 Ala. 687.

3680 (5020). **Judge of probate forfeits fifty dollars for receiving unlawful fee.** — Any judge of probate, who knowingly receives any other or higher fees than are allowed by law, forfeits fifty dollars, to be recovered in the name of the person aggrieved. Such sum, if recovered by a personal representative, or guardian, is assets of the estate. This penalty is no bar to an indictment for extortion.

CHAPTER 2.

FEES OF OFFICERS.

3681 (5026). **Authority to recieve; how taxed and collected.**—Clerks, sheriffs and other officers in this chapter named are entitled to receive, for the services therein mentioned, the fees to such services respectively annexed, and no more; to be taxed, paid and collected in the manner directed by the provisions of this Code.

3682 (5027). **Fees allowed to clerks of circuit court.** Clerks of circuit courts are entitled to receive the following fees for the following services:

Issuing summons and complaint	$ 1 25
Making every copy thereof	30
Making every copy thereof, when over two hundred words, for each hundred words	20
Entering sheriff's return, or copy thereof	20
Docketing cause, to be charged but once	25
Entering appearance	20
Filing pleas, demurrer and other pleadings, for each	10
Every order made in court, not otherwise provided for	30
Making copy thereof	25
Every trial, with or without jury, and its incidents	75
Entering up judgments, or copy thereof	30

Every scire facias, or notice in the nature thereof	$ 75
Every execution, or copy thereof	50
Entering return, or copy thereof, for each hundred words 10 cents; but in no case less than	20
Recording the award of arbitrators, referees, auditors, etc., for each hundred words	20
Issuing execution, or attachment thereon, and entering return	1 00
Taking bond for certiorari, supersedeas, or appeal, or copy thereof, and filing same	75
Issuing subpœna, for each witness	30
Administering an oath in court, not relating to the trial pending, and certifying the same	25
Issuing each attachment and taking bond	1 00
Filing attachment	15
Issuing each summons for garnishee in attachment	50
Swearing and taking examination of garnishee, and recording same, for each hundred words, 20 cents; but not less than	50
Order to advertise, or order of survey, or copy thereof	50
Recording each survey and surveyor's report, or copy thereof, for each hundred words 15 cents; but not less than	25
Issuing commission to take depositions, or copy thereof	75
Making copy of interrogatories accompanying commission, 50 cents; or for each hundred words	15
Filing each deposition	20
Issuing writ of ad quod damnum, or writ in the nature thereof	75
Recording the return and inquest thereon, 50 cents; or for each hundred words	15
Issuing writ of certiorari, prohibition, mandamus, or writ in the nature thereof	75
Filing the same and return	15
Making a complete record of a cause, or copy thereof, for each hundred words	20
Making copy of any paper not herein provided for, for each hundred words	20
Making each certificate requiring the seal of office, and affixing seal	75
Taking any bond not otherwise provided for	75
Making each necessary certificate not otherwise provided for	25
Entering each order of continuance	10
Performing official duties not otherwise provided for, to be paid from the county treasury, such sum as may be allowed by the court of county commissioners, not exceeding per annum	200 00
Except in Barbour county, in which it shall not exceed	400 00

3683 (5028). **Fees allowed to registers in chancery.**—Registers in chancery are entitled to the following fees for the following services:

Issuing each subpœna on a bill	$ 50
Issuing any other subpœna	40

Entering each return thereof	$ 15	
Entering each decree	75	
[1] Making copy of bill, answer, or other proceeding, for every hundred words	15	[1] As amended, Feb. 13, 1879, p. 197.
Each report containing five hundred words or less	2 50	
For every one hundred words over five hundred	25	
Taking an account, swearing witnesses, and performing other services relating thereto, for each day while engaged therein	3 00	
Taking each bond	1 00	
Appointing trustee	75	
Recording resignation, removal, or suggestion of death of trustee	75	
Issuing each notice required by law not otherwise provided for	50	
Making abstract for publication, for each hundred words	20	
Each execution	75	
[2] Making a complete record, or copy thereof, for each hundred words	15	[2] Ib.
Taking questions and answers and recording same, in proceedings to perpetuate testimony, for each hundred words, to be paid by the applicant	25	
Performing other duties in relation thereto, for each application, to be paid by the applicant	1 00	
Making each deed to property sold	2 00	
Making each certificate required by law, with or without official seal	50	
[3] Copying or recording each paper or record not otherwise provided for, for each hundred words	15	[3]
Relieving minors of disabilities of non-age, and married women of disabilities of coverture, in cases where there is no contest, to be paid by the minor or married woman, or his or her next friend, not exceeding	5 00	
Commissions on sales: For the first hundred dollars, two per cent.; for all over one hundred dollars, and not exceeding one thousand dollars, one and one-half per cent.; for all over one thousand dollars, one per cent.; but for making sale to satisfy mortgage or deed of trust, when the property sells for more than twenty thousand dollars, he shall receive one-quarter of one per cent. on all over twenty thousand dollars.		
Receiving money in cases in which decree is rendered in favor of a special administrator under section 2271 (2626), one-half of one per cent. on the amount received.		
Filing each bill or other paper	20	
Docketing each cause and entries, to be charged but one time	1 00	
Writ of injunction, attachment, ne exeat, or other writ	1 50	
Copy of same	50	
Issuing commission to take testimony, answers, etc	50	
Decree pro confesso against each defendant	75	
Each order appointing guardian ad litem, or any order by and before the register	75	
Each order of court	50	
Receiving and publishing each package of testimony	20	

Noting of testimony on hearing of cause ..... $	50
Each witness' certificate	25
Entering each report and confirmation	1 00
Each settlement with trustee, for each day engaged therein	3 00
Each license issued to attorney to practice, with orders pertaining thereto	5 00
Examination of each answer on exceptions, to see whether the same is full and sufficient	3 00
Abstract of each cause as it stands on the docket for use of the chancellor	1 00
Each appeal to the supreme court and citation	1 00
Each copy of citation	50
Hearing application for receiver, each day	3 00

3684 (5029). **Fees allowed to clerk of supreme court.** The clerk of the supreme court is entitled to receive the following fees for the following services:

Docketing each cause ..... $	30
Entering each appearance of attorney	30
Each bond	50
Each appeal or writ of error	50
Each order	50
Each continuance	25
Each judgment	1 00
Each certificate of default of clerk of lower court to forward transcript in criminal cases within twenty-five days after appeal or writ of error, to be paid by such clerk and the sureties on his official bond	5 00
Each mandate or certificate to the court below	2 00
Each writ of scire facias, certiorari, mandamus, prohibition, or other similar writ	1 00
Filing the same with return	20
Each writ of fieri facias	1 00
Taxing costs, copying and entering satisfaction	85
[1] Copying opinions, record, or paper in his office, for each hundred words	15
In each case an additional fee of	6 00

[1] As amended, Feb. 13, 1879, p. 197.

As amended, Feb. 13, 1879, p. 54.

3685 (5030). **Fees allowed to judges of probate.**—Judges of probate are entitled to the following fees for the following services:

Services rendered in the incorporation of towns, under the provisions of this Code, to be paid by the corporation ..... $	5 00
Each entry of an estray, to be paid by the taker	50
Each record of a mark or brand	25
Filing statement required to be made by foreign life insurance companies under section 1211 (1447)	5 00
Filing and recording all certificates of incorporation of religious, [1] educational, benevolent and burial societies.	2 00
Each certificate given under the chapter in relation to hospitals, diseases, infection and quarantine	50
Issuing and recording marriage license, together with consent to the marriage, and certificate of its celebration	1 50

[1] As amended, Feb. 23, 1883, p. 181.

Celebrating rites of matrimony	$ 1 50	
Services rendered in legitimatizing and adopting children under sections 2365 (2743), 2366 (2744), and 2367 (2745)	1 00	
Issuing writs of ad quod damnum for the erection of dams or public mills	2 50	
And, for each copy of such writ and application, twenty-five cents, to be paid at the time such application is made; and if publication is required, the applicant must deposit with such judge an amount sufficient to cover the expenses therefor; for each notice to show cause, and copy, fifty cents, to be paid by the applicant on the return of the inquest, and before the issue of the notice; for determining on the application, two dollars, to be paid by the applicant if the same is not contested, otherwise, by the unsuccessful party; for issuing subpœnas to attend on the hearing of the application, the same fees as in other cases, to be paid by the unsuccessful party; for which execution may issue.		
Each day engaged in making division of property under provisions for partition of property	2 00	
Recording the proceedings of commissioners, for each hundred words	15	
Services rendered in proceedings to have persons declared of unsound mind, and appointing guardian for them	5 00	
All orders on presenting will for probate	1 00	
Examination of witnesses and order admitting will to probate	2 00	
Presiding at trial of contested will, for each day	2 50	
Granting letters testamentary or of administration	50	
[2]Order appointing general guardian or administrator, or administrator ad litem	1 00	[2]March 1, 1881, p. 160, sec. 1.
Issuing and recording same	50	
Taking, approving, filing and recording bond of executor or administrator	1 50	
Granting order of appraisement or sale of personalty	50	
Issuing order of appraisement or sale of personalty	25	
Order removing executor, administrator, or guardian	2 00	
Granting letters of guardianship, for each minor	75	
Taking, approving and recording bond of guardian	1 00	
Issuing, filing and recording letters of guardianship	50	
Order appointing commissioners to divide real or personal property, and issuing writ to the sheriff	2 00	
Approving such division and entering order thereon	1 00	
Order on application to sell real estate, appointing day for hearing, and order for notice	1 00	
Order appointing guardian ad litem on application to sell land and giving notice to such guardian	50	
Examining testimony and granting order to sell land	2 00	
Making and entering order approving sale of land	75	
Hearing application for dower, issuing writ and entering all necessary orders, and recording assignment of dower	4 00	
Examining, stating and passing the accounts of executors, administrators and guardians, for final or partial settlement, and appointing day for hearing	1 00	

Appointing guardian ad litem for such settlements, and giving notice to same ..... $ 50
Examining each voucher 10
Making decree on annual or partial settlement, and order to record the same 1 50
[3] March 1, 1881. p. 161, sec. 1. [3] Making each decree on final settlement 50
Each copy of any order of publication, and having same published 50
Entering all necessary orders in relation to insolvent estates, for each order or decree 25
Issuing each writ, citation, or notice required by law, and entering sheriff's return 50
Filing each claim, and giving receipt therefor 15
Approving each bond not otherwise provided for 50
Recording each decree relieving minors from the disabilities of non-age 1 00
Recording wills, inventories, sale bills, reports, certificates, transcripts, returns, orders, decrees, declarations of incorporations, deeds, and all other instruments, and all proceedings required by law to be recorded, and not otherwise provided for, for each hundred words 15
Taking questions, answers and recording the same, in proceedings to perpetuate testimony, for each hundred words, to be paid by applicant 20
Other services in relation thereto, to be paid by applicant 75
Each certificate, with seal of office 50
Each certificate without seal of office 25
Each commission to take depositions 50
Filing interrogatories 10
Copying interrogatories, deeds, orders, decrees, or other proceedings, or instruments, not otherwise provided for, for each hundred words 15
Administering affidavit, not otherwise provided for 25
Presiding in court of county commissioners and keeping minutes of such court, for each day 3 00
Trying and sealing weights and measures, for each weight and measure sealed, to be paid by the person for whom services performed 25
[4] March 1, 1881, p. 166, sec. 1. [4] Each acknowledgment or probate of deed, or other conveyance 50
Services rendered in and about limited partnerships: For each acknowledgment, fifty cents; for filing and recording the original certificate and acknowledgment, and each transcript of the same, seventy-five cents; for each affidavit, twenty-five cents; for making out transcript and certifying the same, fifty cents; and the same fees on the renewal or continuance of the partnership.
Hearing an application to compel a personal representative to convey land under contract of testator or intestate, and making all necessary orders and decrees, to be paid by the unsuccessful party 2 00
Discharging his duties in relation to public roads, on proof to the court of county commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding 90 00

Receiving money under section 2288 (2629), when decree is rendered in favor of special administrator, one-half of one per cent. on amount received.
On all sums paid to him as escheats, ten per cent. thereon.
All other official duties, for the compensation of which no express provision is made by law, such sum as may be allowed by the court of county commissioners, to be paid out of the county treasury, not exceeding per annum $200 00
Recording proceedings in each case for binding out apprentice, to be paid by master 1 00
Every certificate or charter issued to a private corporation 1 00

Registration of conveyances.—Tillman v. Wood, 58 Ala. 578.

3686 (5031). **Judge of probate to make itemized account for services.**—It is the duty of the several judges of probate to make out an itemized account for their official services before their fees are due and collectible.

3687 (5032). **Fees allowed to sheriffs.**—Sheriffs are entitled to receive the following fees for the following services:

Services rendered in the incorporation of towns under the provisions of this Code, to be paid by the corporation ..... $ 5 00
Serving and returning an application to perpetuate testimony, to be paid by the applicant 1 00
Services in proceedings to incorporate railroads under the laws of this state, such fees as are usually allowed in civil proceedings.
Services in cases of arbitration under the provisions of this Code, the customary fees for executing subpœnas, which must be paid jointly by the parties, unless the arbitrators otherwise determine.
Services in relation to persons of unsound mind, the same fees as are allowed for similar services in other cases, to be paid out of the county treasury, if such person has no estate.
Levying attachment 1 50
Entering and returning same 25
Summoning garnishee and making return 1 30
Selling property attached, the same as for selling under execution.
Serving summons and other mesne process, and returning the same 1 30
Summoning each witness, and returning subpœna 65
Impaneling a jury, in each case when a jury is sworn 75
Executing a writ of possession 2 50
Making a deed to real estate sold 2 50
Serving summons and making return in cases of forcible entry and detainer and unlawful detainer 1 00
Executing writ of restitution in such cases 2 00
Other services in such cases, the same fees as in circuit court.
Collecting execution for costs only 1 50
Summoning a jury for any inquisition in the county, or under a writ of ad quod damnum or dower, and at-

tending on such jury, and taking inquest, per day, when no other provision is made by law.....$ 5 00

Serving subpœnas on bills in chancery, and returning the same, for each defendant..... 1 50

Serving scire facias, or notice in the nature thereof, and returning the same..... 65

But no fee shall be charged by him for serving a scire facias on a defaulting juror or witness, when the same is excused by the court without terms.

Serving any summons not herein provided for, and making return..... 65

Serving attachment for contempt of court, or rule to show cause..... 1 50

Taking and approving bonds of every kind..... 75

Collecting money under execution: For the first hundred dollars, five per cent.; for the second hundred dollars, four per cent.; and, for collecting all sums over two hundred dollars, three per cent.; but no commissions must be charged on costs.

Levying execution when sale is stayed after levy by any restraining order, one per cent. on the amount of the judgment, to be paid by the party obtaining the order, to be taxed for his benefit, if successful, against the adverse party on the termination of the suit.

When an attachment is by him levied on personal property, which is replevied, or the cause is settled without a sale, he is entitled to one-half the commissions upon the amount of the demand sued for, allowed him for making money on execution, to be paid by the party paying such demand, or replevying such property; and, if such demand is afterwards collected upon execution, or other final process, he must receive only half commissions; and if the plaintiff fails to obtain judgment, the amount so paid on the replevy of the property must be taxed as costs against him, and collected for the benefit of the defendant.

[1] Jan. 22, 1885, p. 94, sec. 1.

[1]Attendance upon the chancery court, each day, to be paid out of county treasury..... 2 00

[2] Ib. sec. 2.

[2]And the register, after the adjournment of each term of such court, shall certify to the court of county commissioners the number of days the sheriff so attended, and the amount of his compensation therefor; and thereupon, that court shall allow the compensation so certified, and a warrant therefor shall be drawn in favor of the sheriff on the county treasurer.

Discharging his duties in relation to the public roads, he is entitled to receive annually, on showing to the court of county commissioners that he has discharged such duties, to be paid out of the county treasury, not exceeding..... 90 00

[3] As amended, Feb. 12, 1879, p. 62.

[3]Services under the provisions of this Code for the erection of dams and public mills: For the service of each writ, application, or notice, and return thereof, fifty cents; for summoning a jury and attending and charging the same, and returning their inquest, five dollars, to be paid by the applicant before any other proceed-

ings are had; for serving subpœnas and other services, the same fees as in other cases, to be paid by the unsuccessful party, for which execution may issue.

Seizing personal property under writ of detinue..... $1 50

Taking care of such property, such just compensation as the court may fix.

[4]Impaneling grand juries, advertising and attending all elections in his county, and for all other public services not otherwise provided for, such sum as may be allowed by the court of county commissioners, to be paid out of the county treasury, not exceeding two hundred and fifty dollars per annum. [4]Ib.

Fees and commissions for levying and making money on execution or attachment. Mastin v. Cullom, 28 Ala. 670; Kahn v. Locke, 75 Ala. 332.

3688. Fees allowed coroner.—The coroner is entitled to receive, for services rendered by him in civil cases, the same fees as are allowed to sheriffs for like services.

3689 (5033). **Fees allowed justices of the peace.**—Justices of the peace are entitled to receive the following fees for the following services:

Services under section 1359 (1581), in relation to taking up studs and jackasses, to be paid by the owner.....	$ 1 00
Administering the oath to the taker, summoning householders to appraise the property, taking bond and making return to the judge of probate, in relation to estrays, to be paid by the taker.....	1 00
Proving property by the owner and issuing order to restore the same, in such matter, to be paid by the owner.....	1 00
Issuing order to fence viewers under section 1371 (1593), one-half to be paid by each party.....	50
Making appraisement and summons in proceedings in relation to "salvage," for each, to be paid by the person taking up the property.....	1 00
Summons and proceedings thereon to judgment, if judgment be for less than fifty dollars.....	50
Same services if judgment be for more than fifty dollars	1 00
Each warrant in a qui tam action, and proceedings thereon to judgment.....	1 00
Subpœna, for each witness.....	15
Execution, and taxing costs thereon.....	50
Attachment bond and affidavit.....	1 50
Summoning garnishee and taking examination, in all cases in which the answer is for not more than fifty dollars.....	50
Same services, in all cases in which the answer is for over fifty dollars.....	75
Issuing each attachment.....	50
Each appeal or certiorari, including bond and certificate of proceedings.....	1 00
Every other bond.....	50
Administering an oath, and certifying the same.....	25
Every necessary certificate not otherwise provided for..	25
Docketing each cause.....	10
Judgment on forthcoming, stay, or replevin bond.....	50

Each judgment in a summary proceeding	$ 75
Transcript of proceedings other than on appeal or certiorari	50
Issuing venire facias	50
Attending trial of right of property	1 00
Taking and certifying acknowledgments or probates of deeds or other conveyances	50
Each scire facias, or notice in the nature thereof	50
Making return of certiorari, other than in cases of forcible entry and unlawful detainer	50
Every summons in cases of forcible entry and detainer and unlawful detainer	50
Administering oath or affirmation in such cases	10
Entering judgment in such cases	25
Each trial in such cases	2 00
Each writ of restitution in such cases	25
Return on appeal or certiorari in such cases	1 00
Celebrating rites of matrimony	1 50

3690 (5034). **Fees allowed to constables.**—Constables are entitled to the following fees for the following services:

Serving summons	$ 50
Summoning each witness	25
Levying an attachment for not exceeding fifty dollars	75
Levying an attachment for more than fifty dollars	1 00
Levying an execution for not exceeding fifty dollars	50
Levying an execution for more than fifty dollars	1 00
Making money on execution, two per cent. on the amount collected, but in no case less than	50
Serving notice on each party therein named	25
Serving scire facias, or notice in the nature thereof	50
Taking any bond required by law	50
Keeping property levied on, such sum as the justice of the peace may order to be paid out of the money in the hands of the constable arising from the sale.	
Services in forcible entry and detainer and unlawful detainer, the same fees as in other cases.	

CHAPTER 3.

FEES OF JURORS AND WITNESSES.

3691 (5049, 5056). **Jurors in circuit, city and chancery courts.**—Regular and tales jurors serving in the circuit and city courts in civil cases, and those serving in the chancery court are entitled to the same fees and allowances as provided by law for criminal cases, to be evidenced and paid in the same manner.

3692 (5055). **Pay of jurors in trial of right of property before justice.**—Jurors in trials of right of property before justices of the peace are each entitled to fifty cents for their services in each case tried by them, to be taxed as costs against the unsuccessful party.

3693 (5052). **Pay of jurors in ad quod damnum proceedings.** The viewing jurors in cases of erection of dams and establishment of public mills, and all jurors summoned under writs of ad quod damnun are each entitled to two dollars, to be paid by the applicant before return of verdict.

3694 (5057). **Pay of jurors condemning for turnpike.**—For condemning lands for turnpike roads the jurors are entitled to two dollars a day, to be taxed as costs.

3695 (5054). **Pay of jurors and witnesses on inquisition of lunacy.**—Jurors and witnesses summoned under the provisions of this Code to pass upon the soundness of mind of a person, with a view to the appointment of a guardian, are each entitled to receive seventy-five cents per day of attendance, to be paid, unless otherwise provided, out of the estate of the person, if adjudged of unsound mind, on the certificate of the judge of probate, or if there be no estate, out of the county treasury. If the person be adjudged of sound mind, the fees of jurors and witnesses shall be taxed as costs against the petitioner.

3696 (5064). **Pay of jurors and witnesses in probate court.** Jurors and witnesses in the probate court are entitled to the same pay as in the circuit court, to be taxed as costs, except that, on the trial of contested will cases, the jurors shall, upon the certificate of the judge of probate stating the number of miles traveled and the amount of compensation to which they are entitled, be paid in the same manner as jurors in the circuit court. As amended, Feb. 13, 1879, p. 50.

3697 (5058). **Fees of witnesses before county commissioners.**—Witnesses before the court of county commissioners, or similar court of like jurisdiction, must be compensated as in the circuit court, to be taxed as costs.

3698 (5060). **Fees of witnesses in condemnation.**—Witnesses summoned in ad quod damnun proceedings, to assess the damages to real estate from taking land, are entitled to the same fees and allowances as in the circuit court, to be taxed as costs.

TITLE II.

FORMS OF PLEADINGS IN CIVIL CASES.

COMPLAINTS.

1. ON PROMISSORY NOTE BY PAYEE AGAINST MAKER.

A. B., plaintiff,
vs.
C. D., defendant.

The plaintiff claims of the defendant —— dollars, due by promissory note made by him on the —— day of ———, and payable on the —— day of ———, with interest thereon.

E. F., Att'y for pl'ff.

Letondal v. Huguenin, 26 Ala. 552; Cumming v. Richards, 32 Ala. 459.

2. ON BILL OF EXCHANGE BY INDORSEE AGAINST ACCEPTOR.

A. B., plaintiff,
vs.
C. D., defendant.

The plaintiff claims of the defendant —— dollars, due on a bill of exchange drawn by one E. F. on the ——— day of ———, for —— dollars, upon the defendant, and accepted by him, payable to one G. H. on the —— day of ———, which bill, before maturity, was indorsed to the plaintiff, and, with interest thereon, is due and unpaid.

I. J., Att'y for pl'ff.

3. INDORSEE AGAINST DRAWER.

A. B., plaintiff,
vs.
C. D., defendant.

The plaintiff claims of the defendant —— dollars, due on a bill of exchange drawn by him on the —— day of ———, on E. F. for the payment of —— dollars to G. H., on the —— day of ——, by whom the said bill was indorsed to the plaintiff, and the said bill, not being paid at maturity (or not being accepted, as the case may be), was duly protested, of which the defendant had due notice. The said bill, with the damages and interest thereon, is still unpaid.

I. J., Att'y for pl'ff.

Note.—If the bill sued on is a foreign bill of exchange, the fact should be stated, and the place on which it was drawn.

4. INDORSEE AGAINST INDORSER.

A. B., plaintiff,
vs.
C. D., defendant.

The plaintiff claims of the defendant —— dollars, due on a bill of exchange drawn by E. F. on the —— day of ———, upon G. H. for the payment of —— dollars to the defendant, by whom the said bill was indorsed to the plaintiff, and the said bill, not being paid at maturity (or not being accepted, as the case may be), was duly protested, of which the defendant had due notice. The said bill, with the damages and interest thereon, is still unpaid.

I. J., Att'y for pl'ff.

Battle v. Weems, 44 Ala. 105.

5. ON BOND WITHOUT PENALTY BY OBLIGEE AGAINST OBLIGOR.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, due by bond executed by him on the —— day of ———, payable on the —— day of ———, with interest thereon.

E. F., Att'y for pl'ff.

6. ON NOTE, OR BOND WITHOUT PENALTY, BY ASSIGNEE AGAINST ASSIGNOR.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars as the assignee of a note (or bond, as the case may be), executed on the —— day ———, by E. F., payable to the defendant (or as the case may be) on the —— day of ———, and assigned to the plaintiff, upon which suit has been brought according to law to charge the maker, judgment obtained, execution issued according to law and returned "no property found," which note (or bond), with the interest thereon, is still unpaid.

G. H., Att'y for pl'ff.

Note.—If the maker has not been sued for sufficient reason, the facts should be concisely stated.

Fournier v. Black, 32 Ala. 41.

7. ON BOND WITH CONDITION.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars for the breach of the condition of a bond (or agreement, as the case may be), made by the defendant on the —— day of ———, payable to the plaintiff, in the sum of —— dollars, with condition (here state the condition concisely). And the plaintiff says the condition of the said bond (or agreement) has been broken by the defendant in this, (here state concisely the breaches complained of, first, second, third, etc.), to the damage of the plaintiff as above stated.

E. F., Att'y for pl'ff.

Dothard v. Sheid, 69 Ala. 135; Sprowl v. Lawrence, 33 Ala. 675.

8. ON AN INDEPENDENT COVENANT OR AGREEMENT.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for the breach of a covenant (or agreement, as the case may be), entered into by him on the —— day of ———, by which he promised (here set out the covenant or agreement, and the breach complained of).

E. F., Att'y for pl'ff.

Note.—If a demand is necessary to entitle the plaintiff to his action, it must be averred.

9. ON A DEPENDENT COVENANT OR AGREEMENT.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for the breach of a covenant (or agreement, as the case may be), entered into by him on the —— day of ———, in substance as follows: (Here set out the covenant or agreement, or according to its legal effect). And the plaintiff says that, although he has

complied with all its provisions on his part, the defendant has failed to comply with the following provisions thereof, viz.: (Here insert the matter complained of).

E. F., Att'y for pl'ff.

10. ON AN ACCOUNT OR VERBAL CONTRACT (COMMON COUNTS).

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, due from him by account on the —— day of ——— (or for money loaned by the plaintiff to the defendant on the —— day of ———; or on account stated between the plaintiff and defendant on the —— day of ———; or for merchandise, goods and chattels sold by the plaintiff to the defendant on the —— day of ———; or for money paid by the plaintiff for the defendant on the —— day of ——— at his request; or for work and labor done for the defendant by the plaintiff on the —— day of ——— at his request; or for money on the —— day of ——— received by the defendant to the use of the plaintiff), which sum of money (or sums of money, if there are more than one of the above counts set out), with the interest thereon, is still unpaid.

E. F., Att'y for pl'ff.

Chickering v. Bromberg, 52 Ala. 528.

11. ON AN ACCOUNT OR VERBAL CONTRACT BY TRANSFEREE.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, due from him by account between the defendant and E. F. on the —— day of ——— (or for money loaned by E. F. to the defendant on the —— day of ———; or on account stated between the defendant and E. F. on the —— day of ———; or for merchandise, goods and chattels sold by E. F. to the defendant on the —— day of ———; or for money paid by E. F. for the defendant on the —— day of ——— at his request; or for work and labor done by E. F. for the defendant on the —— day of ——— at his request; or for money on the —— day of ——— received by the defendant to the use of E. F.), which sum of money (or sums of money, if there are more than one of the above counts set out), with the interest thereon, is still unpaid, and is the property of the plaintiff.

G. H., Att'y for pl'ff.

12. ON A POLICY OF LIFE INSURANCE.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars due on a policy, whereby the defendent, on the —— day of ———, insured for the term of —— years the life of E. F., who died on the —— day of ———, of which the defendant has had notice. Said policy is the property of the plaintiff.

G. H., Att'y for pl'ff.

13. ON A POLICY OF FIRE INSURANCE.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, the value of a dwelling house (or other property as the case may be), which the defendant, on the —— day of ———, insured against

loss or injury by fire and other perils in the policy of insurance mentioned, for the term of —— years, which house (or other property) was wholly destroyed (or was damaged) by fire on the —— day of ———, of which the defendant has had notice.

E. F., Att'y for pl'ff.

14. ON A POLICY OF MARINE INSURANCE.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, the value of certain goods which the defendant, on the —— day of ———, insured against loss or injury by the perils of the seas, and other perils in the policy of insurance mentioned, from the port of New York to the port of Mobile, on board the bark Neptune, which goods were wholly lost by the shipwreck of the said vessel on her voyage, of which the defendant has had notice.

E. F., Att'y for pl'ff.

15. ON A BILL OF LADING OF A COMMON CARRIER.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for the failure to deliver certain goods, viz.: (Here set them out), received by him as a common carrier, to be delivered to the plaintiff at ——— for a reward, which he failed to deliver.

E. F., Att'y for pl'ff.

Note.—If the injury complained of is the failure to deliver the goods by the time stipulated, or within a reasonable time, or injury to the goods, it should be so stated.

16. FOR SLANDER.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for falsely and maliciously charging the plaintiff with perjury (larceny, or as the case may be), by speaking of and concerning him in the presence of divers persons, in substance, as follows: (Here set out the defamatory language), viz., on the —— day of ———.

E. F., Att'y for pl'ff.

17. FOR LIBEL.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for falsely and maliciously publishing of and concerning him in a newspaper published at ———, called ——— (or book, or writing, as the case may be), the following matter, with intent to defame the plaintiff, viz.: (Here set out the language charged as libelous), on the —— day of ———.

E. F., Att'y for pl'ff.

18. FOR ASSAULT AND BATTERY.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for an assault and battery committed by the defendant on the plaintiff, viz., on the —— day of ———.

E. F., Att'y for pl'ff.

Williams v. Ivey, 37 Ala. 242; s. c., Ib. 244.

19. FOR FALSE IMPRISONMENT.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for maliciously, and without probable cause therefor, arresting and imprisoning the plaintiff (or causing the plaintiff to be arrested and imprisoned, as the case may be), on a charge of larceny (or as the case may be), for —— days, viz., on the —— day of ———.

E. F., Att'y for pl'ff.

Williams v. Ivey, 37 Ala. 242; s. c., Ib. 244; Holly v. Carson, 39 Ala. 345.

20. FOR MALICIOUS PROSECUTION.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for maliciously, and without probable cause therefor, causing the plaintiff to be arrested under a warrant issued by E. F., a justice of the peace, on the —— day of ———, on a charge of larceny (or as the case may be), which charge, before the commencement of this action, has been judicially investigated, and said prosecution ended, and the plaintiff discharged.

G. H. Att'y for pl'ff.

21. FOR DECEIT IN SALE OF CHATTELS.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for deceit in the sale of a horse (or as the case may be), which the defendant, at the time of the sale, knew to be unsound.

E. F., Att'y for pl'ff.

22. ON A WARRANTY.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for a breach of warranty in the sale of a horse (or as the case may be) by him to the plaintiff, on the —— day of ———, which the defendant warranted (here insert the substance of the warranty), when in fact (here state the breach according to the facts).

E. F., Att'y for pl'ff.

Herring v. Skaggs, 73 Ala. 446; Roberts v. Flemming, 31 Ala. 684.

23. FOR TRESPASS IN TAKING GOODS.

A B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant, —— dollars, damages for wrongfully taking the following goods and chattels, the property of the plaintiff, viz.: (Here describe the goods).

E. F., Att'y for pl'ff.

24. FOR THE CONVERSION OF CHATTELS.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for the conversion by him, on the —— day of ———, of the following chattels: (Describing them), the property of the plaintiff.

E. F., Att'y for pl'ff.

25. FOR THE RECOVERY OF CHATTELS IN SPECIE.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant the following personal property, viz.: (Describing it), with the value of the hire or use thereof during the detention, viz., from the —— day of ———.

E. F., Att'y for pl'ff.

Thompson v. Pearce, 49 Ala. 210; Crimm v. Crawford, 29 Ala. 623.

26. FOR TRESPASS TO LAND.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, damages for a trespass by the defendant on the following tract of land, viz.: (Describing it), belonging to (or in the possession of) the plaintiff, and for cutting the timber (or other injury as the case may be), on the —— day of ———.

E. F., Att'y for pl'ff.

Pike v. Elliott, 36 Ala. 69.

27. UNLAWFUL DETAINER.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff sues to recover possession of the following tract of land: (Describing it), of which he was in possession, and upon which, pending such possession, and before the commencement of this suit, the defendant lawfully entered, on demise of the plaintiff for one year (or otherwise, as the case may be), and which now the defendant, after the termination of his possessory interest, and after the plaintiff's demand in writing therefor, unlawfully detains, together with —— dollars for the detention thereof.

E. F., Att'y for pl'ff.

28. FOR FORCIBLE ENTRY AND UNLAWFUL DETAINER.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff sues to recover the following tract of land (or its possession, as the case may be, describing it), of which he was in possession, and upon which, pending such possession, and before the commencement of this suit, the defendant forcibly entered, and now unlawfully detains.

E. F., Att'y for pl'ff.

29. FOR THE RECOVERY OF LAND (STATUTORY EJECTMENT).

A. B., plaintiff, vs. C. D., defendant. } The plaintiff sues to recover possession of the following tract of land: (Describing it), of which he was in possession, and upon which, pending such possession, and before the commencement of this suit, the defendant entered and unlawfully withholds, together with —— dollars for the detention thereof.

E. F., Att'y for pl'ff.

Bush v. Glover, 47 Ala. 167.

30. FOR RENT ON DEMISE.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars, the rent of a tract of land, viz.: (Describing it), demised by the plaintiff to

the defendant on the —— day of ———, said rent commencing on the —— day of ———, and ending on the —— day of ———.

E. F., Att'y for pl'ff.

31. FOR USE AND OCCUPATION OF LAND.

A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant —— dollars for the use and occupation by him of the following tract of land, viz.: (Describing it), belonging to the plaintiff, from the —— day of ——— to the —— day of ———.

E. F., Att'y for pl'ff.

PLEAS.

32. STATUTE OF LIMITATIONS.

A. B., plaintiff, vs. C. D., defendant. } The defendant, for answer to the complaint, saith that the note (contract, or as the case may be,) is barred by the statute of limitations of —— years.

X. Y., Att'y for def't.

33. NON EST FACTUM.

A. B., plaintiff, vs. C. D., defendant. } The defendant, for answer to the complaint, saith that the note (or bond, as the case may be), upon which the action was founded, was not executed by him, or by any one authorized to bind him in the premises; and he makes oath that this plea is true. (If filed by an executor or administrator, that he believes it to be true.)

X. Y., Att'y for def't.

34. NOT GUILTY.

A. B., plaintiff, vs. C. D., defendant. } The defendant, for answer to the complaint, saith he is not guilty of the matters alleged therein.

X. Y., Att'y for def't.

35. PAYMENT.

A. B., plaintiff, vs. C. D., defendant. } The defendant, for answer to the said complaint, saith that he has paid the debt (or demand), for the recovery of which this suit was brought, before the action was commenced.

X. Y., Att'y for def't.

Barbour v. Washington, 60 Ala. 433.

36. TENDER.

A. B., plaintiff. vs. C. D., defendant. } The defendant, for answer to the complaint, saith that he tendered to the plaintiff the amount due to him, to wit, —— dollars, before the action was commenced, and now brings the money into court. (In the case of chattels, that he is and always has

been ready and willing to perform his contract with the plaintiff, or deliver the chattels in suit, as the case may be, and offered to do so before the action was commenced.)

X. Y., Att'y for def't.

37. SET-OFF.

A. B., plaintiff,
vs.
C. D., defendant.

The defendant, as a defense to the action of the plaintiff, saith that, at the time said action was commenced, the plaintiff was indebted to him in the sum of —— dollars by note (liquidated or unliquidated demand, as the case may be, describing it by its date, amount, when, and to whom payable), which he hereby offers to set-off against the demand of the plaintiff, and he claims judgment for the excess (if the set-off exceeds the plaintiff's demand). X. Y., Att'y for def't.

Lang v. Waters, 47 Ala. 624.

38. USURY.

A. B., plaintiff,
vs.
C. D., defendant.

The defendant, for answer to the complaint, saith that the said note (bond or contract, as the case may be), upon which the action is founded, is usurious and void for the interest thereon.

X. Y., Att'y for def't.

Note.—If the usurious interest has been included with the principal, the fact should be stated, and the amount of such interest.

39. INFANCY.

A. B., plaintiff,
vs.
C. D., defendant.

The defendant, for answer to the complaint, saith that, at the time of the execution of the note, the foundation of the suit, (or at the time of the creation of the debt, or making of the contract, as the case may be), he was a minor, under the age of twenty-one years. X. Y., Att'y for def't.

RULES OF COURT AND PRACTICE,

ADOPTED BY

THE SUPREME COURT OF ALABAMA.*

GENERAL RULES.

1. Appearances, how entered; leading counsel and notices.—The clerk of every court of record in this State shall keep in court in term time, and in his office in vacation, a book to be called the "Book of Appearances." Any attorney or solicitor, desiring to appear in any civil cause, shall make in said book, or cause to be made therein by the clerk, an entry of his name, stating the cause in which he appears, and, if there be several of the same name, its number, or other mark of identity, the party or person for whom he appears, and the date of such entry. Such entry shall be considered an appearance of record. The counsel whose name shall be so first entered shall be considered the leading counsel in the cause, for the party or person for whom he so appears, until he abandons the cause, and then the counsel whose appearance shall be next in date, and so on. Such notices, etc., as are authorized to be served on the attorney of a party, shall be served on his leading counsel.

Moore v. Dickerson, 44 Ala. 485.

2. Who may appear.—No one shall be permitted to appear in a cause as counsel or attorney, unless he has been employed therein, and his appearance has been entered as aforesaid, or unless he represent other counsel whose appearance has been so entered, or may have the special leave of the court.

3. Abandonment of cause.—Counsel shall be considered as having abandoned a cause by entry to that effect, by failing, at two successive terms of the court, to appear or be represented therein, by removal from the State, by quitting the practice, or by death; in any of which, and in such other cases as the court may direct, the clerk may enter such abandonment on the book of appearances.

4. Pleadings and briefs signed by counsel.—All declarations, pleas, briefs, etc., must be signed by counsel where counsel is employed.

5. Solicitors and attorneys receipt for and keep papers twenty-four hours.—It shall be the duty of the several clerks

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*Adopted December 5, 1876, to take effect January 1, 1877.

and registers of courts in vacation to permit the attorney or solicitor of record for either party, in any suit pending in their courts, to take from the office the papers in any cause, and retain them for the space of twenty-four hours at any one time, he executing a receipt therefor, specifying the title of the cause, the pleadings, and process on file, and, if an attachment cause, the bonds and affidavits on file; the papers not to be carried beyond the limits of the town in which the office of the register or clerk is located, and the clerk or register shall at all times have access to them.

6. Substitution of lost records or papers; compelling production of written evidence in aid of.—Whenever a party to a pending suit or motion shall make or desire to make a motion to substitute a paper or record, or part thereof, which has been lost or destroyed, and such party, or his attorney, shall suppose that a party to the suit, motion, or record, or his attorney, or any other person, has a paper, book, memorandum, or record, relevant to such motion in his possession, or under his control, such party, or his attorney, or other person, may be compelled to produce the same, as evidence on such motion, after one day's notice to do so; and, on failure to do so, may be dealt with as for a contempt of court; and the court before which the motion is made may make such order or decree, or render such judgment on the motion, as, in its discretion, may seem just and proper.

7. When motion considered pending.—For the purposes of such motion, the suit or motion shall be considered as pending until a final disposition and record have been made of it.

8. When notice of motion necessary.—No notice of such motion shall be necessary, when the party against whom the motion is made is plaintiff, or is in court by personal service, appearance, or publication. If the party be not thus in court, notice of the motion may be given either by personal service, as provided by section 649 of the Revised Code, or by publication, as provided by section 653 of the Revised Code.

RULES OF PRACTICE IN THE SUPREME COURT.

1. Assignment of errors and joinder therein.—In assigning errors, it shall be sufficient to state concisely, in writing, in what the error consists. The words, "There is no error in the record," shall be a sufficient joinder in error.

Glover v. Lyon, 57 Ala. 365.

2. Additional assignments.—On application to the court, additional assignments may be filed at any time before joinder, but after joinder, such only as will affect the merits of the controversy.

As amended, Dec. 17, 1884.

3. Cross assignment of errors.—When there are cross appeals in the same cause, there shall be but one transcript, upon which each appellant may assign errors. If the appeal be taken by the party or parties on one side only, the appellee can only assign errors upon the record brought up by the appellant, by

consent of the appellant in writing indorsed on the transcript, or a joinder by the appellant in such assignment of errors. When such assignment and joinder are made, the clerk shall docket the case, as if an appeal had been taken by such appellee; and the transcript shall be a part of the record in the case wherein errors are thus assigned by the appellee, as well as in the original case; and the case in which the appellee thus assigns errors shall, in all respects, be regarded as a case on appeal taken by him.

Leslie v. Langham, 40 Ala. 524; Wright v. Evans, 53 Ala. 103.

4. Order of calling and trying cases.—Each case, not being within the rule concerning delay cases, nor within the exceptions hereinafter expressed, must be called and tried according to its order on the docket, unless, for good cause shown, it be continued or passed over.

5. Authorities furnished opposing counsel one day before trial; penalty for failure.—A list of the authorities to be used in the argument of any cause shall, if applied for, be furnished to the counsel for the adverse party, one day before the trial; otherwise, they shall not be read or commented on in the argument on behalf of the party so in default, but they may be cited.

6. Opening and conclusion of argument.—The appellant in this court shall be entitled, ordinarily, to open and conclude the case; but when there are cross appeals, they shall be argued together as one case; and the plaintiff or complainant in the court below shall be entitled to open and conclude the argument. Adopted Dec. 11, 1884.

7 (6). **Authorities read in opening argument.**—No authority which was not read in the opening argument shall be read in the conclusion, unless by leave of the court, or to rebut authority introduced by the adverse counsel.

8 (32). **Arguments limited to one hour.**—No argument of counsel shall extend beyond the period of one hour, unless by consent of the court, obtained before the argument of the cause is commenced.

9 (18). **Briefs.**—The counsel for the appellant or plaintiff in error, in each case, shall furnish to the court a brief, containing a statement of the points to be decided, and of the facts of the case, so far as necessary to show the manner in which those points arise; and the counsel for the appellee or defendant in error, in like manner, shall furnish a brief setting forth the points of the defense.

10 (7). **Roll of attorneys.**—The clerk shall keep a list or roll of all attorneys of this court, entering their names in the order in which they were admitted.

11 (8). **Special motions on Thursday, and call of roll.** Special motions shall be heard on each Thursday of the term; and for this purpose the clerk shall call over the names of the attorneys, beginning with the attorney-general, and proceeding with the others according to their order on the roll.

12 (9). **Motion docket; notices of motions.**—The clerk shall keep a motion docket, in which shall be entered all motions for argument which are not ex parte, or of course. In such entry the nature and particular grounds of the motion shall be desig-

nated, and, at least one day before the hearing of the motion, the entry shall be shown to the counsel for the adverse party, or he shall have such written notice as will enable him to refer to it.

13 (10). **Order of business on Thursday.**—On each Thursday, after the ex parte motions have been heard, the criminal cases must be called, and shall be in order until they are disposed of, unless continued or postponed by the court; after the criminal cases have been disposed of, motions requiring argument, and applications for mandamus, prohibition, or other remedial writ, will be heard, and next, appeals belonging to the division from orders or decrees dissolving or refusing to dissolve injunctions; appointing or refusing to appoint receivers; sustaining or overruling a demurrer to a bill in equity; or sustaining or overruling a motion to dismiss such bill for want of equity; or sustaining or overruling a plea to such bill, shall be called, and stand for trial as preferred causes, in the order in which they stand on the docket.

14 (11). **Delay cases.**—On any motion day, if the counsel for the defendant in error or appellee state that it is his belief that the case is brought into this court merely for delay, the record shall be submitted to the court without argument on either side. If the court, on examining the record, consider it a delay case, the judgment shall be affirmed; but if it appear to be doubtful or difficult, or if, when so offered to be submitted, or at any time during the term, the counsel for the plaintiff in error or appellant state to the court that it is his opinion that, on more full examination, the judgment will be reversed or corrected, it shall not be so affirmed; or if such judgment of affirmance has been entered, it shall be set aside, and the case shall stand over for argument in its regular order.

15 (12). **Certiorari.**—A certiorari to perfect or bring up a complete record may be awarded at the first term, on motion of either party, if its object be to sustain a judgment, without a showing; but if to reverse a judgment, a sufficient showing must be made.

16 (13). **Restrictions upon use of papers by attorneys.**—The clerk may permit either of the attorneys concerned in a cause to take the record and papers thereof from the clerk's office, to be returned at such time as by the rules of the office may be directed; but no transcript or other papers (except briefs), after being filed in this court, or being submitted to the court, shall be delivered to the bar, except for use and examination within the capitol; and all members of the bar are positively forbidden to take any such record or paper from the capitol.

17 (14). **Time of examination for license.**—The examinations for licenses must be on any Thursday of the term.

18 (15.) **Examination of applicants for license.**—The examination of applicants under the eye of the court must be thorough, and well calculated to test the extent of the applicant's professional attainments; and when these are defective, the court must not hesitate to withhold a license.

19 (16). **Graduates of law department of University of Alabama.**—Whenever the president and professors of the law department of the University of Alabama shall officially certify to this court, that the university has conferred the degree of Bach-

elor of Laws upon a graduate in that department, it shall be the duty of the clerk to enter the name of such graduate upon the roll of attorneys of this court, and to issue to him a license, upon application and payment of the usual fees, authorizing him to practice law in any court of the State of Alabama, on taking the oath prescribed by statute.

20. Admission of attorneys.—Attorneys of the age of twenty-one years, licensed by the circuit courts, or courts of chancery of this state, and who have, for two years thereafter, practiced in the courts of this state, will be admitted to the bar of this court during term time, upon application and payment of the usual fees, on filing with the clerk of this court, in writing, the oath of an attorney as prescribed by the statute; and the certificate of the chancellor of the division, or judge of the circuit, in which he resides, that he is of good moral character and has so practiced for such length of time. Adopted Jan. 6, 1882.

21 (17). **Agreements in writing.**—No private agreement or consent between the parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby.

22 (19). **Paper of transcripts.**—All transcripts of records must be on paper of uniform size, according to the sample furnished by the clerk of the supreme court, with a blank margin, at the top, bottom and sides of each page, of an inch and a half, exactly conforming to those marked on the sample.

23 (20). **Original paper sent by order of judge or chancellor.**—Whenever it shall, in the opinion of the judge of any court, or of any chancellor, be necessary or proper that original papers of any kind should be inspected in the supreme court, such judge or chancellor may make such rule or order for the safe keeping, transporting and return of such original papers as to him may seem proper; and such papers will be considered by the supreme court in connection with the transcript of the proceedings. This rule shall apply as well to cases heretofore tried as to those which may hereafter be tried.

Pruitt v. McWhorter, 74 Ala. 315.

24 (21). **Original papers not sent, but copied in transcript, except as directed in the preceding rule.**—No original bill of exceptions, or paper read or offered in evidence, shall be sent to this court. Copies of bills of exceptions, and of papers therein referred to, shall be inserted in their proper places in the transcripts.

25 (22). **Mode of preparing transcript.**—The pages of the transcript shall be numbered. Each transcript shall be prefaced by an index of its contents, specifying the pages at which the various matters (as the writ, declaration, pleas, bill of exceptions, judgment, bill in chancery, answer of each defendant, deposition of each witness, each interlocutory order or decree, final decree, etc.), are to be found. The several answers of witnesses, as made in depositions, shall each follow consecutively the particular interrogatory to which it is responsive. Marginal references to the several matters, as above, shall be made throughout the transcript. The transcript must be fast- As amended, the amendment taking effect from and after April 1, 1885.

ened together on the left side of the page by ribbon or tape, so that the same may be secure, and every part conveniently read, and must be written in a fair, legible hand; and each paper or order composing such transcript must constitute at least one paragraph. No paper less than the sample furnished must form a part of such transcript, and the space within the margin must be filled with writing or printing, leaving appropriate spaces between the paragraphs, with lines drawn along such spaces.

Adopted Feb. 22, 1887.

26. Papers to be omitted from transcript.—In making out transcripts in cases brought to this court by appeal or writ of error, the clerks and registers of the primary courts must not insert any subpœnas or summons for any witness, nor for any defendant, where there is an appearance by such defendant; nor any orders of continuance; as to any of which proceedings or matters no question is raised; nor any commission to examine a witness, nor certificate of a commissioner to a deposition, nor any affidavit made to obtain such commission, except where a question as to the sufficiency or legality thereof appears from the record to have been decided in the primary court.

Adopted April 25, 1878.

27. Abridgement of record by agreement.—When an appeal is taken to the supreme court from any of the courts of record of this state, the parties, their solicitors, or attorneys, may make an agreement in writing, specifying what part of the proceedings shall be inserted in the transcript; and it shall be the duty of registers, clerks and judges of probate, when such agreement is filed, to include in the transcript only such part of the proceedings as shall be specified in such agreement; and the agreement itself shall be made a part of the transcript.

28 (23). **Seal, how placed; papers otherwise attached not parts of transcript.**—The clerk's seal shall be so placed across the fastening of the cord with which the sheets are stitched that no part of the transcript can be detached without separating the seal, cord, or paper. No paper attached by wafer, paste, or in any other manner than as above, shall be considered as part of the transcript.

29 (24). **Certificate of appeal, citation, bond, security for costs.**—All transcripts must contain a certificate of the fact that an appeal was taken, and the time when, and a copy of the appeal bond, or certificate of the names of the sureties for costs, and a copy of the citation and its service, but if a copy of such citation and service cannot be inserted in the transcript, the original may be sent to the clerk of the supreme court.

30 (25). **Clerk furnishes sample, and must not docket case unless transcript conforms to rules.**—The clerk of the supreme court furnishes samples of paper, and must not receive any transcript, or docket the cause, unless such transcript is conformable to the foregoing rules.

31 (26). **Affirmance on certificate.**—If the transcript of the record is not delivered to the clerk, and errors assigned within the first three days of the term, the defendant in error is entitled, at any time before the record is filed and the errors assigned, to his judgment of affirmance, on production of the proper certificate or citation.

32 (27). **Affirmance on certificate set aside on filing transcript.**—Whenever a judgment shall be taken before a call of

the division to which the case properly belongs, it will be deemed a sufficient cause to reinstate the case and to set aside the judgment, if the transcript is filed at any time before the first motion day after the call of the division.

33 (28). **Setting aside affirmances in other cases.**—In all other cases where a motion is submitted to set aside a judgment rendered on certificate or citation, affidavits must be produced showing satisfactory reasons why the transcript was not filed within the first three days after the call of the division to which the cause belongs. If the transcript offered is defective, the transcript must show either that application has been made for a correct transcript, or that there was not sufficient time after the defect was discovered to procure one before the adjournment of the court. And, in either event, the deficient matter must be stated with sufficient certainty to enable the defendant in error to admit the existence of the same, and to proceed as if the record was complete.

Jones v. Matthews, 48 Ala. 558.

34 (29). **Certificate when no proceedings at return term.** When an appeal has been taken, or shall hereafter be taken to this court from any court, and the term of this court to which such appeal is taken shall close its session, or cease to hear arguments, if the record in such case shall not have been filed, and no order made in this court, either continuing said cause or disposing of the same, it shall be the duty of the clerk of this court, at the request of an attorney thereof, to certify such failure to file the record, or have such order made in the cause, to the register, clerk, or probate judge of the court from which it is represented that such appeal has been prosecuted; and the certificate made pursuant to this rule shall be a full authority to the register, clerk, or probate judge to proceed in said cause as if no appeal had been prosecuted.

35 (30). **Paper of applications for bail, mandamus, etc., must correspond with transcript.**—All applications to this court to admit to bail, or for the writ of habeas corpus, mandamus, or other writ or process depending on motion in this court, together with all papers and proceedings touching the same, shall be presented on folio paper, of the pattern now required by the rule for ordinary transcripts, so that the same may be in suitable form for binding; and no application shall be heard that is not so presented.

36 (31). **Abatement on failure to revive by next term after suggestion of death.**—When the death of a party has been suggested, and an order made to revive in the name of or against the heirs or personal representatives of the deceased, and this is not done by the next term of the court, the suit shall abate, unless, for sufficient cause shown, the court shall extend the time.

37 (33). **Rehearings.**—All applications for a rehearing must be in writing, and filed with the clerk of the court within twenty days after the rendition of judgment; no entry must be made of the filing of such application, but the clerk must immediately deliver the same to the chief justice. If the term at which judgment is rendered expires before the twenty days have elapsed, the application may be made in vacation within the twenty days, and may be considered and granted or over-

ruled at the next term of the court, but shall not operate to supersede or suspend execution without the order to that effect of one of the judges of this court.

Adopted July 3, 1884.

38. Duty of clerk as to sending copies of opinions.—It shall be the duty of the clerk of this court to send a copy of the opinion of the court to the court below, in all cases decided on appeal, except when the judgment or decree of the lower court is simply affirmed without more; and for this he shall be allowed the usual fees for copying.

Adopted Feb. 8, 1884.

39. Establishing bills of exceptions.—When it is proposed to establish a bill of exceptions under section 3111 of the Code of 1876 [section 2762 of this Code], the testimony for and against such motion must be taken and certified under the following regulations: The opposing parties may agree in writing on one or more commissioners; or any competent justice of the peace, or other judicial officer, at the option of the party desiring to take testimony, may act as commissioner, with authority, in either case, to administer oaths to witnesses, and to take, reduce to writing and certify the testimony. The party desiring to examine a witness, or witnesses, under this rule, shall cause reasonable notice in writing to be served on adverse counsel, in no case to be less than five days, giving notice of the time and place of examination, and of the witnesses proposed to be examined. Such notice, with the service thereon, shall be made part of the deposition, unless the commissioner certifies that the adversary party, by himself or counsel, was present at the examination. In taking such testimony, no commission or written interrogatories shall be necessary; but interrogatories, cross interrogatories and rebutting interrogatories may be allowed; and the whole must be taken and certified, pursuing substantially the rules and forms required in the matter of depositions in chancery. Testimony thus taken must be sealed up, directed and forwarded to the clerk of this court, with a memorandum on the envelope as follows: Deposition in case of ——— vs. ———, pending in supreme court; and the commissioner must sign his name thereto as commissioner.

As reorganized, December term, 1886; taking effect Aug. 1, 1887.

40 (34). For practice before the Supreme Court, the counties of the State are divided into eight divisions, as follows:

First.—Baldwin, Clarke, Mobile, Monroe and Washington.

Second.—Bibb, Choctaw, Dallas, Greene, Hale, Marengo, Perry, Sumter and Wilcox.

Third.—Autauga, Butler, Conecuh, Escambia, Lowndes and Montgomery.

Fourth.—Barbour, Bullock, Coffee, Covington, Crenshaw, Dale, Geneva, Henry and Pike.

Fifth.—Chambers, Chilton, Coosa, Elmore, Lee, Macon, Russell and Tallapoosa.

Sixth.—Blount, Cullman, Fayette, Jefferson, Lamar, Marion, Pickens, Tuskaloosa, Walker and Winston.

Seventh.—Calhoun, Cherokee, Clay, Cleburne, DeKalb, Etowah, Randolph, Shelby, St. Clair and Talladega.

Eighth.—Colbert, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marshall and Morgan.

RULES OF PRACTICE IN THE CIRCUIT AND INFERIOR COURTS OF COMMON-LAW JURISDICTION.

1. Order of causes on docket.—The clerk must enter all causes on the proper docket according to the order in which the process commencing the same was received by the sheriff.

2. Motion docket.—He shall keep a separate docket, in which shall be entered all motions made during the term (not incidental to the cause), in the order of time in which they are made, and they shall be called in the same order.

3. Order-book.—He shall keep on his table, when the court is sitting, and at all other times, in his office, a memorandum book, in which the attorneys may respectively enter precipes and other directions to him.

4. Executions, when issued.—On every final judgment rendered during the term (unless the party to be benefited thereby, or his attorney, shall, in writing, otherwise direct), the clerk shall issue execution as soon after the adjournment as the law will permit.

5. Attorneys, security for cost, but not bail.—An attorney may be surety for cost, but shall not be bail for his client, either in a civil or a criminal case.

6. Scire facias, time of pleading to, and trial of.—To every scire facias returned "made known," the defendant shall plead within the first two days of the term to which the same is returned; the plaintiff shall reply on the day next thereafter, and so on from day to day, until issue in fact or in law be joined; but either party may demand a trial at the return term, although the court may not continue in session three days.

7. Oyer of letters testamentary, or letters of administration.—When oyer of letters testamentary, or letters of administration, is demanded, it shall be granted on or before the first day of the term next after the return of the summons or writ, but the trial shall not on that account be delayed.

8. Papers; production of, and penalty.—When the action is on any instrument purporting to have been signed by the defendant, and, within the time prescribed for pleading, he shall give notice to produce it, it shall, within one day thereafter, be produced for his inspection. In default thereof, nonsuit may be entered, unless sufficient excuse be shown.

9. Defaults, at what time entered and taken advantage of.—Defaults may be entered on the docket in vacation, which shall relate to the preceding term, and advantage thereof may be claimed at the next term.

10. Party entering default not bound to receive plea. After a default has been duly entered, the party claiming the benefit thereof shall not be bound to receive any plea or pleading of the party so in default.

11. Default set aside on affidavit.—On timely application, on affidavit showing merits and sufficient matter of excuse, a default may be set aside on such terms as the court may impose.

12. Plea in abatement must appear by indorsement to have been filed in time.—No plea in abatement shall be received, if objected to, unless by the indorsement of the clerk it appear to have been filed within the time allowed for pleading.

Nixon v. State, 68 Ala. 535; Beck v. Glenn, 69 Ala. 121.

13. Motions to quash, when made.—A motion to quash an attachment, appeal, or process, must be made at the first term at which it can be made, and not afterwards.

14. Agreements must be written.—No private agreement or consent between the parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby.

Wright v. Evans, 53 Ala. 103; Collier v. Falk, 66 Ala. 223; Norman v. Burns, 67 Ala. 248.

15. Regulations as to call of docket and trial of cases. The docket of civil causes for trial shall be called absolutely on the first day of the term, unless the presiding judge shall order otherwise. Each cause shall be taken up according to its priority on the docket, and tried or continued. If passed over, it shall not be called again during the term until the other causes for trial have been disposed of.

16. Rules of continuance.—The party applying for the continuance of any civil action must state in the affidavit the names and places of residence of the absent witness or witnesses, what diligence he has used to obtain his or their testimony, and what he expects to prove thereby. If the adverse party will admit what it is so alleged such absent witness will swear, the cause shall not be continued by reason of the absence of such testimony. After the first continuance, such other showing must be made, and such terms may be imposed, as to the court shall seem proper.

Crawford v. State, 44 Ala. 382; Ryan v. Beard, 74 Ala. 306.

17. Second continuance by consent.—No cause shall be continued twice in succession by consent of parties.

18. One counsel examines witness.—On trial, only one counsel on each side shall examine a witness.

19. Right of concluding argument.—If the counsel for the plaintiff waives the right of opening the argument, he shall not have the right of concluding.

20. Papers, how prepared and transmitted on change of venue.—On change of venue, the papers must be prepared, enveloped, delivered, or transmitted, and compensation must be paid as prescribed in chapter 12, title 1, part 3, and article 2, chapter 10, title 2, part 4, of the Revised Code.

21. Motion day.—A particular day in each term shall be set apart for hearing motions, but they may be heard at any earlier day by leave of the court.

22. Notice of motions in arrest and for new trials; grounds and affidavit.—Reasons in arrest of judgment, and reasons for new trial, and the affidavits in support thereof, if any are relied on, shall be filed with the clerk, and notice thereof be given to the adverse party, one day before the argument. If the cause is tried on the last day of the term, the notice shall be given

when the motion is entered. The party making such motion is entitled to the opening and conclusion of the argument. All such motions, not acted on, or continued by order of the court, are to be considered as discharged of course on the last day of the term.

23. Rules of practice on appeals.—In cases on error or appeal, the circuit court is governed by the rules of the supreme court, as far as applicable.

24. Ejectment; consent rule.—In every action of ejectment the defendant shall specify, in the consent rule, for what premises he intends to defend, and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in possession of such premises, and that if, upon the trial, the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay cost to the plaintiff, in that case to be taxed.

Alexander v. Wheeler, 69 Ala. 339.

25. Plaintiff in one action of ejectment may notify plaintiff in another for same premises to defend.—Where several actions of ejectment have been commenced for the same premises on the demises of different lessors, it may be lawful for the plaintiff in either of the cases, during the pendency of his suit, to serve a copy of his declaration on the lessors of the plaintiff or his attorney in the other case or cases, with a notice of the pendency of his action, and to require him or them to defend against the same; and in the event of a recovery by the plaintiff giving the notice, it shall not be lawful for the plaintiff, notified as aforesaid, to proceed in the action for the recovery of the tenements sued for, but only for the costs and damages; *Provided*, That sixty days' notice shall be given before the said plaintiff shall be required to join the consent rule.

26. Plaintiff having recovered may notify plaintiff in pending ejectment for same premises.—Whenever a recovery has been had in any action of ejectment, and there has been, and then is, pending an action for the recovery of the same tenements, which action was commenced before the recovery of the lessors of the plaintiff in the former suit, it shall be lawful for the plaintiff in the suit pending to serve a copy of his declaration upon the parties in possession, or who claim interest under the recovery as aforesaid, notifying the said parties of the pendency of the action, and requiring them to defend against the same; and the parties so notified may defend with, or in lieu of the tenants in possession; *Provided*, That the notice hereby contemplated shall be given sixty days before the trial of the cause.

27. May be admitted to defend pending ejectment.—After a recovery by a plaintiff in any action of ejectment as aforesaid, it shall be lawful for the circuit court to admit his lessor to defend in any action of ejectment which may be pending at the time of his recovery, upon a motion to the court for this purpose; and it is made the duty of the court to set forth, in the

order admitting parties under either of these rules, the facts that entitle them to admission.

28. Remanded cause, not continued of course.—Where a judgment is reversed, either by the circuit or supreme court, and the cause remanded, the case shall not be continued, as a matter of course, at the next succeeding term of the court to which it is sent back, but the party desiring a continuance shall show cause thereof, as in other cases.

29. Actions by transferee.—When an action is brought by the assignee, transferee, or indorsee of a contract, verbal or written, for the payment of money, or by a plaintiff averring he is the party really interested in such contract, the interest of the plaintiff in such contract, and his right to maintain such action shall not be disputed except by plea verified by affidavit.

Finnegan v. Frank, 67 Ala. 21; Mobile Ins. Co. v. Egger, Ib. 134.

30. Bills of exception, when signed.—In all circuit and inferior courts of common-law jurisdiction, bills of exception may be signed by the presiding judge at any time during the term at which the trial or proceeding is had, or, by written consent of the parties, or their counsel, filed in the cause, at any time before the next succeeding term of such court, and not afterwards.

RULES OF CHANCERY PRACTICE.

GENERAL REGULATIONS.

1. Court always open for certain purposes; notice of hearing appeals from register.—The courts of chancery shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning original and mesne process and commissions by the register; and for making by and before the chancellor all interlocutory motions, orders, decrees, and other proceedings not affecting the merits of causes, but preparatory to their hearing upon the merits; and, also, for carrying into execution the decrees and orders of such chancery courts and chancellors. This rule includes the hearing of appeals from the register; which motions and appeals can be heard in vacation, at any time or place (within the state), upon ten days' notice of the time and place of making the same, and the decree or order made and forwarded to the register from that or any other place.

Ex parte Branch, 63 Ala. 383.

2. Powers of register in vacation; appeal to chancellor, how certified.—Registers in chancery, during the vacation of their respective courts, may make and direct all such interlocutory orders, decrees, and other proceedings not affecting the merits, nor extending to the decision of demurrers, or testing the equity of the bill, the granting or dissolving of injunctions, or the setting aside of writs of ne exeat, or equitable attachments, or to any other order which is required by statute to be made by the chancellor in court, but preparatory to the hearing of all causes upon their merits. Such orders and de-

crees shall have the same effect as if made by the chancellor; subject, however, in all cases, to the control of the latter, by appeal, to be heard and decided by him, either in vacation or term time. When an appeal shall be taken from the register to the chancellor or court, he shall certify the appeal in the nature of a report.

3. Register keeps book; solicitor draws up application, which is transcribed with indorsement.—The register shall keep a book, in which shall be entered all decrees and orders taken before him. The solicitor of the party applying to the register for any decree or order shall draw the same out with care, describing the cause, the date of the application, and the notice given to the adverse party. If such decree or order shall be granted, the register shall indorse thereon "granted," and date and sign the same, and cause the said order, application and grant to be transcribed on said book; which book shall be one of record of his office.

4. When register grants orders.—Decrees and orders may be applied for before the register every Monday, except in those cases in which notice to the adverse party may be necessary; such orders and decrees shall only be applied for on the first Monday of every month, unless special showing be made, when the register may make them at an earlier day; *Provided*, That this rule shall not apply to orders for the issuing of writs of ne exeat and equitable attachments, and for the sale of personal property levied on, in granting of which registers shall not be restricted to Mondays. If the register should not get through the business before him on any rule day, he may continue his sittings from day to day until the business is disposed of.

5. Notice, when necessary.—No notice shall be necessary to obtain an order of publication against a defendant, a decree pro confesso, an order appointing a guardian ad litem, an attachment against the body or effects, a writ of sequestration, or to examine as a witness a party defendant, subject to all legal exceptions; but in all other cases, not otherwise directed by statute, or in these rules, decrees and orders shall only be made by the register upon five days' notice to the adverse party; which notice must be in writing, and must set forth the nature of the decree or order applied for, a copy of which shall be filed with the register.

6. The register being interested, special register acts.—In all cases when the register is interested or related to the parties within the fourth degree of consanguinity or affinity, it shall be the duty of the chancellor, on the motion of either party, to appoint a special register, who shall perform all the duties, and have all the powers and jurisdiction in the cause which are devolved by law upon the register. The general register shall, however, issue process, make the records, and keep the files, unless otherwise ordered by the court. As amended, Dec. 11, 1882.

7. Rules of English chancery.—In all cases where the statutes of this state, the decisions of this court, or the rules prescribed by it, do not apply, the practice in chancery shall be regulated by the rules, orders, and practice of the English court of chancery (prior to and including those of May, 1845, but not afterwards), so far as the same may reasonably be applied, con-

sistently with the institutions of this country, not as positive rules, but as furnishing proper analogies to regulate the practice.

Goodrich v. Goodrich, 44 Ala. 670; Childress v. Harrison, 47 Ala. 556.

8. Stating part, divided and numbered.—The stating part of all bills must be divided into sections, and numbered consecutively, 1, 2, etc.

9. Interrogatories, divided and numbered.—The interrogatories contained in the interrogating part of such bill shall be divided from each other as conveniently as may be, and numbered consecutively 1, 2, 3, etc.

McKenzie v. Baldridge, 49 Ala. 564.

10. Containing blanks, defective. — Bills which contain blanks shall be considered defective, and may be ordered to be taken off the file.

11. Complainant prescribes matters to be answered by note.—The complainant shall make a note in writing, at the bottom of the bill, as to the particular statements or interrogatories, by number, which he desires each defendant to answer; and the answer need not go beyond such requisition, except for such defendant's own protection.

Sprague v. Tyson, 44 Ala. 338; Martin v. Hewitt, Ib. 418; O'Neal v. Robinson, 45 Ala. 526; McKenzie v. Baldridge, 49 Ala. 564; Russell v. Garrett, 75 Ala. 348.

12. Foot-note specifying matters to be answered, part of bill.—The note at the foot of such bill, specifying the statement or interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to such bill, or any alteration in, or addition to such note, after the bill is filed, shall be treated as an amendment to the bill.

13. Form of interrogating part.—Instead of the words heretofore in use, preceding the interrogating part of the bill, and beginning with the words, "To the end, therefore," such interrogating part in such bills shall be to the effect following: "To the end, therefore, that the said defendants may show why your orator should not have the relief hereby prayed, and may, upon their respective oaths, and according to the best and utmost of their knowledge, remembrance, information and belief, respectively, full, true, direct and perfect answer make to such of the statements, or the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say: 1. Whether, etc. 2. Whether, etc."

14. Bill, etc., how signed.—All bills and petitions shall be signed by a solicitor of the court, except where a party prosecutes in his own proper person; and then it shall be signed by such complainant or petitioner; and where there is a note at the foot of the bill, as directed under the foregoing rules, the same shall be signed in like manner.

15. Bills by married women; how exhibited.—All bills and petitions filed by married women in relation to their separate estates, if over twenty-one years of age, or relieved of the dis-

abilities of coverture, shall be exhibited in thier own names; in all other cases, by next friend.*

Baines v. Barnes, 64 Ala. 375; Sawyers v. Baker, 72 Ala. 49; Werborn v. Austin, 77 Ala. 381.

16. Bills, how sworn to.—In all injunction and other bills and petitions required to be sworn to, the oath or affirmation may be administered and certified by any of the officers thereto authorized by law. A bill may be sworn to by an agent or attorney, but the affidavit must set forth a sufficient reason why it is not verified by the complainant himself.

17. Exhibits part of bill, and admissions of them dispenses with proof.—The copies of all documents appended as exhibits to bills, petitions and answers shall be deemed and taken and held as parts of bills, petitions and answers; and the admission of such exhibits in the answer dispenses with proof thereof.

Wynn v. Rosette, 66 Ala. 517; Dawson v. Burrus, 73 Ala. 111.

18. Prayer, requisites of.—The prayer for process or publication to answer a bill shall contain the names of all the defendants. If an injunction, ne exeat, or any other special order, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

19. Non-resident or insolvent parties may be dispensed with.—In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, reside out of the jurisdiction of the court, or are insolvent, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases, the decree shall be without prejudice to the rights of the absent parties.

20. When parties are numerous, court may proceed, having before it parties to represent adverse interests.—When the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with the making of all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiff and the defendant in the suit. But in such cases the decree shall be without prejudice to the rights and claims of the absent parties.

21. Proceedings to declare married women free dealers. In suits commenced by petition to declare married women free dealers, upon the husband filing his assent thereto in the manner designated in the statute, the register must, upon the application of the petitioner, or her next friend or solicitor, lay such petition and assent of petitioner's husband thereto before the chancellor, without delay, for decree. If the husband fails to file such assent in writing, within five days after the notice prescribed by statute, the cause is to be regarded as being then at issue; forty days, and no more, shall be allowed for the taking of testimony, after the cause is at issue, unless the register, or, in case of appeal from his decision, the chancellor shall, upon special cause, shown by either party, supported by affidavit, en-

*Adopted by Supreme Court 27th January, 1877, and rule 15 of 5th December, 1876, rescinded.

large the time. No testimony taken after such period shall be allowed to be read in evidence at the hearing except by consent of parties. Immediately upon the return of the commissions and depositions, containing the testimony, into the register's office, publication thereof may be ordered by the register or chancellor in vacation upon five days' notice to the parties, or the time may be enlarged, as the register or chancellor in such case may deem reasonable under all the circumstances; but by consent of the parties, publication of the testimony may at any time pass in the register's office, or the time for taking testimony may be enlarged, such consent being in writing and a copy thereof entered in the order-book, or indorsed upon the deposition or testimony. After the expiration of ten days from the date of publication of the testimony, the register, upon the application of the petitioner's next friend or solicitor, must lay before the chancellor, as soon as practicable, all the papers on file in the cause, together with a transcript of all entries made by the register or chancellor on the docket, or other books pertaining to the cause, in the register's office, touching the preparation of the cause for hearing, unless the time for taking testimony shall have been extended in the manner aforesaid. If the cause be decided in vacation, the chancellor's decree, together with the papers in the cause, must be delivered to the register as soon as may be, and the decree enrolled by the register, as other decrees rendered in vacation; but if decided in term time, the decree must be entered as in other causes.*

22. Married women, how served.—Married women may be made defendants by service of summons to answer upon their husbands, if residents and living together, if living apart, by personal service on each, or by order of publication if non-resident; and the copy of the order of publication shall be transmitted to the husband, in all cases, except where the separate estate of the wife is the object of the bill, and then the summons shall be served on her, or the copy of the order of publication be transmitted to her.

23. Infants, how served.—Summons to answer bills issuing against infants may be served upon their parents, or either of them, if in life, or, in case they are dead, upon the general guardian of such infant; *Provided*, Such parent or guardian has not an interest adverse to such infant. When there is no parent or guardian, or the interest is adverse to the infant, if the infant is over fourteen years of age, then the service shall be upon such infant personally; and if the infant is under the age of fourteen, then the summons must be served upon such person as may have the maintenance or charge of such infant, unless opposed in interest. And should there be any case not provided for by statute, or by this or some other rule, and proof be made before the chancellor or register, he may direct the mode of service, or appoint a guardian ad litem for such infant without service.

Hodges v. Wise, 16 Ala. 509; Bondurant v. Sibley, 37 Ala. 565; Carter v. Ingraham, 43 Ala. 78; Rhett v. Mastin, Ib. 86; McIntosh v. Atkinson, 63 Ala. 241; Cook v. Rogers, 64 Ala. 406; McCall v. McCurdy, 69 Ala. 65; Hibbler v. Sprowl, 71 Ala. 50.

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* The statute upon which this rule is based was repealed by the act of February 28, 1887, entitled "An act to define the rights and liabilities of husband and wife." Pamph. Acts, 1886–7, p. 80.

24. Corporation, service of.—Domestic corporations may be served with process by executing it upon the president, or other head thereof, secretary, cashier, or managing agent thereof. If affidavit is made that the officers named in the preceding part of this rule are unknown, absent from, or reside out of the state, the process may be served upon any white person in the employ of such corporation, or doing business for it. Process may be served on foreign corporations by executing it upon any agent of such corporation, or white person in its employ in this state, or by publication, a copy of which may be sent to any of the officers named in the first part of this rule. If a summons to answer a bill is personally served on the agent or person in the employ of such foreign corporation, such agent or employe may be required to answer on oath, as in case of other defendants to bills, and under like penalties.

25. Service of non-residents.—Where a defendant is shown, by affidavit of the complainant or his agent, appended to the bill, or otherwise, to be, in the belief of such affiant, either a non-resident, or that his residence is unknown, or, if a resident, that he has been absent from the state more than six months from the filing of the bill, or that he conceals himself so that process cannot be served upon him; and such affidavit further states the belief of the affiant as to the age of the defedant, being over or under twenty-one years, or, if the residence and age of the defendant are unknown to the person making the affidavit, states that they are unknown, or, if the bill sets forth the facts required to be stated in said affidavits, and is sworn to, it shall be the duty of the register, in vacation, or chancellor, in term time, to make an order against such defendant, requiring him to answer or demur to said bill before a day to be therein named, not less than thirty days, nor more than fifty days from the making thereof. The register shall have all orders of publication against defendants, whether made by the chancellor or himself, published, with as little delay as may be, in such newspaper as may be designated in the order, once a week for four consecutive weeks; a copy of which order he must post up at the door of the court-house of the county, or other place where the court sits, and shall send by mail another copy thereof to the defendant, where his residence is shown by the bill or affidavit, as aforesaid; which copies shall be posted up and sent by mail, within twenty days from the making of said order.

Butler v. Butler, 11 Ala. 668; Hartley v. Bloodgood, 16 Ala. 233; Keiffer v. Barney, 31 Ala. 192; Mobley v. Leophart, 47 Ala. 257; Irwin v. Irwin, 57 Ala. 614; Holly v. Bass, 63 Ala. 387; Paulling v. Creagh, Ib. 398; Cook v. Rogers, 64 Ala. 406; Chilton v. Ala. Gold Life Ins. Co., 74 Ala. 290.

26. Appointment of guardian ad litem, and affidavit of infancy.—If an infant of fourteen years of age fails to name a guardian ad litem, within thirty days after the summons, or after perfecting publication, the chancellor or register, in vacation, or the chancellor, in term time, shall appoint such guardian, who may be superseded by the infant appearing either before the chancellor or register, in vacation, or the chancellor, in term time, and making choice of another, or having such choice certified by a justice of the peace to the court, chancellor, or register, and on the guardian ad litem so appointed, if necessary, putting in an answer for such infant forthwith. In all

cases, a minor fourteen years of age may have his or her choice of a guardian ad litem certified by a justice of the peace. No one shall be appointed guardian ad litem, unless he consent in writing to act as such. No testimony shall be required of the infancy of a party suing or being sued as such; but, before a guardian ad litem can be appointed for an infant defendant, an affidavit must be made as to the fact of infancy, and that the infant is believed to be under or over fourteen years of age; or, if the facts are stated in a sworn bill, it will be sufficient, without any separate affidavit.

Roach v. Hix, 57 Ala. 576; Irwin v. Irwin, Ib. 614; Rowland v. Jones, 62 Ala. 322; McIntosh v. Atkinson, 63 Ala. 241; McCall v. McCurdy, 69 Ala. 65; Hibbler v. Sprowl, 71 Ala. 50.

27. Attachment against defendant failing to answer.—If a resident defendant of full age, as to whom an answer on oath is not waived, fails to answer, and the complainant or his solicitor wishes to enforce one, he may, after the summons to answer has been served for more than thirty days, apply in writing to the register for the issue of an attachment against the body of such defendant; and the register shall issue the same accordingly, without waiting for any order of the chancellor.

28. Sequestration against defendant evading attachment. If a defendant, against whose body an attachment has been issued to enforce an answer, eludes the service thereof, upon affidavit of the fact by the sheriff or his deputy, and by the complainant or his solicitor, of the necessity for an answer to the bill, the register shall issue a writ of sequestration against the estate of such defendant, directed to any sheriff of the State of Alabama.

29. Alias and pluries process without order.—An alias, pluries, or other summons, attachment, or other writ, can issue without any order therefor.

30. Bill dismissed for neglect to bring in defendant.—If the complainant shall not, before the second term after the filing of the bill, have taken measures to bring in the defendant, his bill may be dismissed.

31. Dismissal, when equivalent to dismissal on merits. If the complainant, after the cause is set down to be heard, cause the bill to be dismissed on his application, or if the cause is called on to be heard in court, and complainant makes default, and by reason thereof the bill is dismissed, then, and in such case, such dismissal, unless the court otherwise orders, is equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.

Strang v. Moog, 72 Ala. 460.

32. Certificate requisite to decree pro confesso.—When an application is made to the chancellor, in term time or vacation, for a decree pro confesso against a defendant, as to whom publication has been made, the register, before the decree pro confesso shall be entered, must certify that publication has been made, and therein state when and how, and whether the notice was posted up or forwarded by mail to the defendant, and when; which certificate shall be prima facie evidence of the facts therein stated.

33. Demurrer being overruled, answer filed, or decree pro confesso, or attachment.—When a demurrer is overruled, the defendant shall forthwith put in sufficient answer, unless the chancellor gives further time; and on failure to comply with the order to answer, a decree pro confesso may be entered, or an attachment against the body taken, to be followed, if need be, with a writ of sequestration, where a sworn answer is required.

34. Commission to take non-resident's answer.—When a defendant resides out of the state, and an answer on oath is not waived, the register, on application of the solicitor of such defendant, shall issue a commission to one person or more to take and certify his answer. The affidavit to the answer shall be attached thereto, and be sworn to and subscribed by the defendant before such commissioners, or one of them, and be so certified by him or them, and that such defendant is known to such commissioner. Where an affidavit to a bill or petition of a party residing out of the state is necessary, it may be taken and certified in like manner, or by a commissioner appointed under section 65 of Revised Code [Section 64 of this Code]. The answer of a foreign corporation, taken according to law, may be certified by commissioners appointed in like manner.

Guice v. Parker, 46 Ala. 616.

35. Injunction dissolved on answer only when sworn to. Before a motion can be entertained to dissolve an injunction upon the denials in the answer of the equity of the bill, the answer must be sworn to, whether an answer on oath is waived in the bill or not. A similar course must be taken to authorize a motion to discharge a ne exeat on the answer.

36. Defendant failing to answer not in contempt, until his exceptions are decided.—A defendant, who has excepted to a bill for scandal or impertinence, shall not be placed in contempt for want of an answer, until a decision on the exceptions.

37. If oath waived, no exception to answer for insufficiency. An answer to which the oath of the defendant is waived cannot be excepted to for insufficiency.

38. Proceedings on exceptions to bill or answer.—Whenever exceptions are filed to a bill or answer in vacation, the register shall forthwith issue and cause a notice thereof to be served on the opposite party, or his solicitor; and if such party does not submit to the allowance of such exceptions, or fails, for the space of five days after service of such notice, to apply to the register to fix a day for hearing said exceptions, the register shall proceed without delay to notify both parties of the time when said exceptions will be heard by him, of which five days' notice must be given to the parties; and upon such notice being given, he shall, at the time appointed, proceed to decide on such exceptions, from which decision an appeal may be taken to the chancellor, as in other cases.

39. Proceedings, if exceptions for insufficiency to answer allowed.—Should the register decide, on exceptions to an answer for insufficiency, that the exceptions be allowed, he shall in his order name a day when a further answer must be filed; and if the defendant fails to answer by that day, or puts in an insuffi-

cient answer, the register must enter a decree pro confesso, or, at the election of the complainant, issue an attachment, to be followed, if need be, by a writ of sequestration, to coerce a sufficient answer.

40. If exceptions for scandal or impertinence allowed. Should the register allow an exception for scandal or impertinence, he shall draw black lines around such scandalous or impertinent matter, and write across the face thereof with red ink, "expunged;" *Provided*, That in all cases where a party appeals to the chancellor, all proceedings to obtain a decree pro confesso, or to coerce an answer, or to expunge improper matter, shall be suspended until the decision of the chancellor is announced.

41. Exceptions; time of hearing.—When exceptions to a bill or answer are filed so near to a term of the court that the proper notice cannot be given, they shall be heard at as early a day as practicable during the term, on one day's notice; and if the decision of the register is appealed from during term time, no notice of the hearing upon the appeal shall be required.

42. Amendments; mode of making.—Amendments of bills and answers shall be made on a separate piece of paper, unless the amendment be of a brief character, when it may be made by an interlineation or erasure, with ink of a different color from the body of the bill or answer; and the amendment shall be made in such a manner that it may be ascertained in what it consists.

43. Amendments to bill and answer; notice.—When amendments are proposed under sections 3449 (3790), or 3450 (3791), of the Code, the opposite party shall be served with a copy of the proposed amendment, with notice of the time when the application will be made. When the application will be before the register, under section 3450 (3791), of the Code, the notice shall be five days before the hearing of the application, unless waived; when to the chancellor in vacation, either under that section, or under section 3449 (3790) of Code, ten days' notice shall be given before the hearing of the application, unless waived; but when the application is made in term time, one day's notice shall be sufficient; and when the motion to amend is made at the hearing in term time, no notice shall be necessary, but the chancellor may postpone the hearing of the motion, as justice may require. Where a defendant is in default for want of an answer, the notice will be sufficient if entered on the order-book of the register, as directed by section 3456 (3797) of the Code, for the number of days required by this rule.*

44. Amendments after demurrer and argument thereof. Amendments to bills may be made after the demurrer and argument thereof, in the same manner as is provided for amendments after answer.

45. After answer, order to amend bill generally not allowed.—In all cases where the original bill has been answered, no order can be obtained to amend the bill generally, but the amendments must be prepared and proposed as above directed.

46. Amendments of bills considered as introduced from allowance.—When an amendment to a bill is allowed, it shall

* Numbers changed to conform to the numbers of sections of this Code.

be considered as introduced into the bill from the time of its allowance.

47. Notice of the allowance of amendments, how given. Notice of the allowance of amendments to bills shall be given in the following manner, that is to say:

1. Where the defendants who have answered are actually present in court, either in person or by their solicitors or guardians ad litem, at the allowance of the amentment, they shall be deemed to have notice thereof.

2. After the allowance of an amendment to the bill, the complainant shall cause a notice that his bill has been amended to be served upon all defendants who shall have been served with summons to answer the original bill, and who were not in court, either in person or by solicitor or guardian ad litem, at the allowance thereof; unless the defendant is a non-resident, in which event the court shall direct in what manner he shall be notified.

3. All parties who, at the allowance of an amendment, shall be in default, shall be deemed to have notice thereof, after a notice that the bill has been amended shall have been entered on the order-book for such time as the chancellor or register may direct.

Holly v. Bass, 63 Ala. 387.

48. Supplemental matter introduced by way of amendment.—New facts occurring since the filing of a bill may be introduced by way of amendment, without a supplemental bill.

P. & M. Ins. Co. v. Selma S. Bank, 63 Ala. 595.

49. Decree pro confesso not set aside by amendment, and effect of decree pro confesso on amendment.—An amendment to a bill, or the filing of an amended bill, shall not set aside a decree pro confesso as to any defendant to the original or any other bill; nor shall a decree pro confesso for want of an answer to an amendment or an amended bill operate as a decree pro confesso on the original or any other amended bill already answered.

49*a*. Submission of cause; time of filing amendment when dismissed in vacation.—When a cause is submitted in term time, or in vacation, on the pleadings and evidence for a final decree in vacation, and the bill is dismissed in vacation on account of defects in the pleadings, or a variance between the proof and the allegations of the bill, if the complainant desires to amend the pleadings, he must apply to the chancellor for leave to amend on or before the second day of the next ensuing term of the said chancery court. Adopted Feb. 2, 1887.

50. Decree pro confesso after thirty days.—A decree pro confesso may be entered upon amendments, against each defendant who fails to answer the same within thirty days after notice thereof, as above provided, unless the matter of the amendment has been denied in some previous answer of such defendant. When the justice of the case requires it, the chancellor or register allowing the amendment may enlarge the time for answer.

TESTIMONY.

51. Testimony taken after cause is at issue.—Testimony cannot be taken by either party until the cause is at issue by sufficient answer, or decree pro confesso, as to all the defendants.

Harris v. Moore, 72 Ala. 507.

52. Interrogatories filed and copy served.—When a cause is at issue, as laid down in the last rule, either party desiring to take testimony, must file his interrogatories in the office of the register, a copy of which must be served upon the opposite party, as directed in sections 3471 (3812) and 3472 (3813) of the Code.*

53. Party desiring to be present gives notice.—When a party desires to be present at the examination of a witness against him, he shall give notice to the adverse party, by filing a notice with his cross-interrogatories; whereupon, it shall be the duty of the register to prescribe the notice which he shall receive of the time and place of the execution of the commission.

54. Re-examination.—A party against whom a witness has been examined may re-examine such witness, provided he did not file cross-interrogatories upon the first examination. The examination, under this rule, shall operate as a cross-examination of such witness. Both parties shall have the liberty of being present at such re-examination, but the party wishing to re-examine such witness shall give such notice to the opposite party of the time and place of such re-examination as the register shall prescribe.

55. By parties filing cross-interrogatories.—When a party who has filed cross-interrogatories afterwards learns that the witness has a knowledge of facts which he did not know at the time of filing his cross-interrogatories, it shall be the duty of the register, on affidavit made, setting forth such facts, to order a re-examination, as in the preceding rule.

56. Examinations de bene esse.—When a bill is filed, and, either before or after the same is at issue as to all the defendants, upon affidavit made that any witness of the complainant is over sixty years of age, or so infirm that affiant fears that injury will result from delay owing to such infirmity, or that he is about to remove permanently from the state, or that he is a single witness to a material fact, the chancellor or register, in vacation, or the chancellor, in term time, shall make an order to take the testimony of such witness de bene esse. Such order may be made for the examination of such witness or witnesses upon interrogatories, after three days' service of a copy of the same upon the opposite party or his solicitor, and upon cross-interrogatories, which may be submitted at any time before the examination. Or the court, chancellor, or register, may fix the time and place of the examination of such witness or witnesses, and the notice of the same to be given to the opposite party, and such examination may be upon interrogatories propounded orally or in writing. In either case, the register may take such

* Numbers changed to conform to the numbers of sections of this Code.

examination, or may issue a commission to one or more suitable persons to take the same.

57. After the examination of a witness de bene esse, the party shall not be required to make further examination, but may use testimony so taken on the hearing; the opposite party, however, shall have the right to retake the testimony of such witness. A defendant, who has answered the bill when the cause is not at issue as to other defendants, may, in like manner, and for like causes, examine any of his witnesses de bene esse.

58. Testimony in interpleader.—The complainant in a bill of interpleader, intending to take testimony, must give notice and serve interrogatories upon the parties required to interplead; and if either of the defendants desires to take testimony, he must serve interrogatories as well upon the complainant as upon the adverse defendant; but after a decree of interpleader, it shall not be necessary for either defendant taking testimony to serve the complainant with interrogatories or notice.

59. Mode of impeaching testimony.—The testimony of witnesses may be impeached by deposition, taken according to the Code and the foregoing rules, and no articles of impeachment shall, in any case, be filed.

60. Notice accompanies interrogatories; objection to commissioner.—A notice shall accompany interrogatories to take the deposition of a witness, giving the names of the commissioner or commissioners. If the opposite party has any objection to such commissioner or commissioners, he shall file his objections within the time prescribed for filing exceptions to interrogatories; and the same shall be heard by the register and decided, and the decision reviewed, as in case of interrogatories. If the register overrules the objection, the commission shall issue to the person or persons proposed; if he allows the same, he shall appoint some other person or persons, free from objection, to execute the commission.

61. Chancellors appoint examiners; qualification and duty. The several chancellors in this state shall, within their respective divisions, have power to appoint one or more examiners in each county, to take and certify the depositions of witnesses, who shall be officers of the chancery court, and sworn faithfully to discharge the duties of their office; and if, upon filing interrogatories, no commissioner shall be named by the complainant or his solicitor, nor any other person than the examiner suggested by the defendant or his solicitor, the deposition shall be taken by such examiner, without any commission from the register; but either party may, by writing indorsed on the interrogatories or cross-interrogatories, require the examiner to give him notice of the time and place of taking the testimony. Such examiners shall have the like power to compel the attendance of witnesses, and shall be entitled to the same fees as are allowed to commissioners by the existing laws.

62. Names and residences of witnesses given.—Hereafter, when a party files interrogatories to examine a witness or witnesses, he shall give the name or names of the witnesses, and place or places of their residence, or make affidavit that the same is unknown; and, on failure to do so, no commission shall

issue, nor proceedings be had on said interrogatories, except by consent of the opposite party, or his solicitor.

63. No interrogatories or notice to party in contempt; waiver of notice.—A defendant, against whom a decree pro confesso shall be in force, shall not be served with a copy of the interrogatories, or any notice of the taking of the testimony; nor shall it be necessary in such case that the interrogatories shall be filed in the register's office any number of days before a commission issues. In all cases the parties can waive the ten days' service of interrogatories, and a consent in writing to the issue of a commission shall be deemed a waiver.

64. Inclosure and direction of depositions; publication; after publication testimony not taken without consent or order.—Depositions shall be sealed up with the commission by the commissioner, with the title of the case and the names of the witnesses indorsed on the envelope; and the package shall be directed to the register at the proper place. Publication of the testimony must be passed by the court, or before the chancellor or register, or it may be done, by consent of parties, in writing entered on the back of the deposition or depositions, or otherwise. After publication passed, no testimony shall be taken except by consent, or by special application to the chancellor and allowance by him.

Quarles v. Campbell, 72 Ala. 64.

65. Register's duty on publication of testimony.—When testimony is published, the register shall withdraw the same from the envelopes, and indorse the title of the cause with the names of the witnesses, and by which party examined, upon the back of the depositions, and that the same was published by order of the court, chancellor, or register, or by consent of parties, and then file the same with the papers of the cause.

66. Proof of exhibits and documents.—No order shall be necessary to prove exhibits viva voce; but where there is not a decree pro confesso, or the proof of exhibits, or notice waived, the opposite solicitor must be served with one day's notice before the hearing that such exhibits will be proved at the hearing. Other documentary testimony may be proved on like notice. The court can put off the hearing to give time to prove or rebut documentary testimony.

Dawson v. Burrus, 73 Ala. 111.

DOCKETS, SPECIAL TERMS, HEARINGS, DECREES, AND APPEALS.

67. Docket; what it must contain; filed with papers. The register of each court shall prepare a docket, for each term, of all the causes not finally disposed of at the previous term, and of the suits since commenced, in which shall be entered the name of each complainant and defendant. This docket must be laid off with appropriate columns; one with names of the solicitors and the number of the cause; one with the names of the parties; in another must be entered the time when each

pleading was filed, and, opposite to the names of the respective defendants, the state of the cause as to such defendants; as thus: "Answer filed," "answer filed by guardian ad litem," "decree pro confesso on publication," as the case may be; and where the cause is not at issue as to any defendant, a vacant space must be left opposite the name of such defendant. In another column must be entered, in regular order as to time, a short note of the several orders and decrees made in the cause by the court, chancellor, or register, in one place, and those by the register in another; with the note of the orders made by the register shall be noted the date of the issue and return of all summons and other process, orders and rules. This docket will contain one other distinct column, left blank for the entries of the chancellor during the term.

The register will file in the papers of each cause on the docket an exact copy of the docket of said cause, and the entries thereon, for the use of the chancellor, which paper is part of the record. The causes will be placed on the docket in the order in which the original bills are filed; and the number placed on the bill when filed must not be changed, and all the papers of the cause must be so numbered.

68. Caption of minutes; form of.—The caption of the minutes of a regular term of the court of chancery must be in the following form, to-wit:

"At a court of chancery held for the —— district, composed of the county of ——, in the State of Alabama, at the court-house thereof, in the town of ——, on the —— Monday of ——, being the —— day of said month, in the year of our Lord, one thousand eight hundred and ——; present, the Honorable ——, chancellor of the —— chancery division of said state," as the case may be. Where the court is held at a different place than the county-site, or there are more counties in the district than one, the proper changes will be made.

69. Special or extra terms; proceedings in reference to. When a special or extra term of a court of chancery is ordered by a chancellor, he will transmit the order therefor to the register, who must enter the same on the minute-book of the court immediately after the minutes of the previous term, file the order in his office, and have the same published as directed by the chancellor, and certify to such chancellor, who is to hold said extra term, that publication has been made in pursuance of said order. When a special or extra term is held, the caption of the minutes of the courts shall be so varied as to show the time when the order therefor was made, and the length of time it was published, certified as above.

70. Hearing; failure of parties to appear; setting aside default.—When a cause is called for hearing, if the complainant does not appear, it shall be dismissed; if he appears, and the defendant does not, it shall be heard and decree rendered according to the claim and proof. Either party, on timely application, may set aside his default, on such terms as the court may impose.

71. Continuance.—Application for continuance for want of testimony must be in writing, and conform to the rule in regard to the continuance of trials in the courts of law.

72. No continuance without disposition of the question of equity.—No application for a continuance for want of testimony must be considered, unless the equity of the bill is admitted, until the question of equity is disposed of, by way of motion to dismiss for want of equity, or, if there is a demurrer to the bill, by decision on the demurrer.

73. Demurrers and pleas; when filed. — All demurrers, whether contained in the answer or not, are to be disposed of on the calling of the cause, without waiting for the cause to be ready on the proof; but when the cause is ready for hearing on the pleadings and proofs, it must be heard, without waiting for a separate decision on a demurrer contained in the answer. This rule must also apply where a plea is interposed, the truth of which is admitted.

74. Exceptions and demurrer; when heard.—All exceptions to bills, answers, reports, or testimony, whether coming before the court in the first place for consideration, or by way of appeal or review, must be heard in connection with the equity of the bill, unless that question has been previously decided or admitted; also, if there is a demurrer undisposed of in the case, it must be considered by the court at the same time with the exceptions.

75. Pleas, demurrers, or motions to dismiss for want of equity, may be heard in vacation.—When a plea or a demurrer is interposed to a bill, either party may set the same down for hearing in vacation, whether it is filed without answer, or incorporated in the answer; the hearing to be had on ten days' notice to the adverse party of the time and place, and the same shall be decided by the chancellor as if the hearing was had in term time. Any material defendant may, on ten days' notice to the complainant or his solicitor of record, before answer, and before the first term after the filing of a bill, move to dismiss the bill for want of equity, and such motion shall be heard and determined by the chancellor as if made in term time. Decrees of the chancellor rendered under this rule shall be filed with the register, and by him enrolled as if made in term time. The hearings to be had on copy of bill, and of plea or demurrer, certified by the register and furnished by the party applying for the hearing.

76. Motion to dismiss for want of equity; when heard. A defendant may, at any stage of the cause, move to dismiss a bill for want of equity, unless a similar motion has been previously made and determined. If the cause is ready for hearing on bill and answer, or pleadings and proofs, such motion may be made and heard in connection with the final hearing.

Madden v. Floyd, 69 Ala. 221; Hooper v. S. & M. R. R. Co., Ib. 529.

77. Proceedings on hearing.—On the hearing of a cause, the court can dispense with the reading of the pleadings and proofs; and in that case, the complainant's counsel must state the case made by the bill, and the defendant's counsel the defense made by the answer. The complainant's counsel must then offer his testimony in chief, naming the witnesses and other testimony, of which the register must take a note; and then that of the defendant must be offered, and noted by the register; to which the complainant, in like manner, must offer his rebutting testi-

mony. Any testimony not offered in this way, and noted by the register on the minutes, must not be considered as any part of the record, nor be considered by the chancellor. Counsel on either side, in the course of their arguments, can read any portion of the pleadings or proofs. A hearing on bill and answer, motion, demurrer, exceptions, or appeal, shall conform, as far as applicable, to this rule.

Jones v. Beverly, 45 Ala. 161.

78. Memorandum of testimony entered and copy filed. The register shall enter on the minutes of the court a memorandum of the testimony offered by each party on the hearing of a cause, a copy of which shall be filed with the papers for the use of the chancellor.

79. Submission at call for motions.—At the call for motions, each morning, any cause can be submitted for decree without argument, unless objection is made; and when a cause is submitted for decree without argument, the testimony must be offered and noted, as directed in the two foregoing rules.

80. Decrees in vacation; proceedings and process on. When a cause is submitted during term time for a decree or order, such decree shall be valid if rendered during any vacation. When any decree or order is made by a chancellor in vacation, it shall be the duty of the register, as soon as the same is filed in his office, to enter the same at length on the minute-book of the court immediately after the minutes of the previous term, and the same shall be considered as enrolled from and after such entry, which shall be dated; but if said decree be other than for the payment of money, no process for its execution shall issue thereon until the next ensuing term of the court, unless the complainant, or his solicitor, shall have given to the defendant, or his solicitor, ten days' notice in writing of his or their intention to have execution of the decree, which notice shall be served by the sheriff, and filed with the register, as a paper in said cause. When the decree is rendered in vacation, either party may apply for a rehearing by the second day of the next ensuing term of said court.

Forrest v. Luddington, 68 Ala. 1; Hooper v. Strahan, 71 Ala. 75.

80*a*. Consents to orders and decrees entered into in vacation.—Consents entered into in vacation, that chancellors shall make orders and render interlocutory or final decrees in vacation, shall be in writing, signed by the parties, or their counsel, and filed in the cause in which made; when made for an infant party to the cause, such consent shall be signed by the guardian ad litem of such infant, or by such other party as may be the duly authorized representative of such infant in the case, or by the counsel of such guardian ad litem or other representative. Adopted Feb. 2, 1887.

81. Decrees in term time; chancellor's reasons, transcript. All decrees and orders made by the court in term time, with the exception of their captions, shall be entered at length on the minutes of the court. The chancellor's reasons, however, for such decree or order shall not be entered. If an appeal should be taken, the register shall not include in the transcript both the original order of decree on file, and the entry on the minutes; nor shall they both be included in the final record.

82. Rehearing.—A party desiring a rehearing of a decree must apply to the chancellor at chambers, by petition, during the term in which the decree is rendered. The petition need not state any of the proceedings anterior to the decree sought to be reheard, but must state the special matter or cause on which the rehearing is applied for, and the principal points in which the decree is alleged to be erroneous; and the facts, if they do not appear from the records of the court, must be verified by the affidavit of the party, or some other person. The petition must be confined to the case made by the record. On this petition the chancellor must determine, without argument, whether the cause ought to be reheard; and, if he concludes to grant a rehearing, order accordingly, but if he declines to do so, no order must be made on said petition.

83. Orders, and opening of them.—An order of reference, or to take and state an account, or make inquiry by the register, or any other order preparatory of a cause, whether made by the chancellor or register in vacation, or by the court, may, at any subsequent time before final decree, be opened, varied, or discharged, on motion of either party, or the court may, without motion, revoke any order previously made.

84. Questioning final decree after adjournment.—A final decree shall not be called in question, before the court rendering it, after the adjournment of the term when rendered, except by bill of review, and shall never be impeached by original bill, unless on the ground of fraud.

85. Transcript on appeal.—When an appeal is taken from a decision of the chancellor on any matter decided by him, the transcript sent to the supreme court must contain, as well a copy of the opinion filed by the chancellor, if any, as of the decree or order appealed from.

86. Appeal; in whose name taken.—Any complainant or defendant, in a cause in which a decree or order final may have been rendered, may appeal to the supreme court in the name of himself and all the other complainants or defendants to the decree.

87. Appeal bond for restoration of injunction; ne exeat or writ of seizure.—The chancellor shall, upon making any final or interlocutory decree which has the effect of dissolving an injunction, or discharging a ne exeat or attachment in chancery authorizing the seizure of property, prescribe the penalty and condition of the bond to be given by the appellant, should he thereafter appeal from such decree; and the appeal in such cases, when taken before the register, and the bond executed as prescribed by the chancellor, and approved by the register, shall operate to restore the injunction, ne exeat, or writ of seizure in the nature of an attachment, until the same shall be reviewed in the supreme court.

PROCEEDINGS BEFORE THE REGISTER AS MASTER.

88. Sessions of register, place of.—The sessions of the register, as master in chancery, shall be held at his office, unless the chancellor or court otherwise directs, or he himself appoints a different place by consent of parties.

89. Testimony, how taken.—Testimony offered before the register must be noted by him, and nothing not so offered shall be considered. Oral testimony taken before him shall be reduced to writing, paged severally, and the name of the witness and the subject of the testimony noted in the margin. Such testimony shall be properly attached, and is part of the file. Exceptions to rulings of the register on testimony, admitted or rejected by him, must be noted by him; and if not so taken, the exception is waived.

Weaver v. Cooper, 73 Ala. 318.

90. Accounts before register, form of.—All accounts taken by the register shall be in the form of debtor and creditor, and the vouchers must be so numbered as to correspond with the numbers on the account. A reference, however, to ascertain the amount due from one party to another, where a statement of an account is not necessary, need not be in this form.

90*a*. Accounting before register.—All parties accounting before a register shall bring in their respective accounts in the form of debtor and creditor, verified by affidavit; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party, viva voce or upon interrogatories, in the register's office, or by deposition, as the register shall direct. Adopted April 7, 1883.

91. Notice of taking account.—The register shall not be required to give notice of the taking of an account to any defendant who has failed to answer the bill. Where a reference is executed during term time, one day's notice must be given to the parties entitled, unless waived, and, when executed in vacation, at least five days.

92. Objections to report, exceptions heard by chancellor. No notice to the parties to bring in objections to the draft of a report shall be necessary, nor can any exceptions be taken before the register to such draft; nor shall any exceptions to a re-report be referred to the register, but the same shall be heard and decided, in the first instance, by the chancellor or court.

Clark v. Knox, 70 Ala. 607.

93. Exceptions, how taken.—In filing exceptions to the report of the register, or any part thereof, it shall be the duty of the solicitor filing the same to note at the foot of each exception to conclusions of facts, drawn by the register, the evidence, or parts of evidence, he relies on in support of the exceptions, with such designation and marks of reference as to direct the attention of the court to the same; and if the opposing solicitor desires to do so, he can note in writing such other parts of the evidence as he may deem material to the inquiry. In considering such exceptions, the chancellor need not examine testimony

not thus noted. To enable the opposing solicitor to file such additional note under this rule, he shall be allowed one day after the exceptions are filed, within which to do the same, if he state his belief that the testimony referred to by the party excepting does not fairly and fully present the question for decision.

Stewart v. Cross, 66 Ala. 22; Mooney v. Walker, 69 Ala. 75; Vaughan v. Smith, Ib. 92; Crump v. Crump, Ib. 156; Clark v. Knox, 70 Ala. 607; Pruitt v. McWhorter, 74 Ala. 315.

94. Report, confirmation of; exceptions to.—Reports of the register, read in open court on one day, may be confirmed the next, unless excepted to; and when that is the case, exceptions can be heard and determined without further postponement. The chancellor may extend the time for excepting to reports, and for hearing exceptions, to such day or days as he may deem proper; but a defendant against whom a decree pro confesso has been entered, and who has not appeared before the register on the reference, shall not be allowed to except to the report, but, as to such defendant, the report shall be confirmed when read. Any defendant who failed to appear before the register on the reference, or is otherwise in contempt, or who has not submitted to the jurisdiction of the court, shall not be allowed to except to the report of the register, but, as to such defendant, the same shall be confirmed when read. A defendant against whom a decree pro confesso is in force, and who appeared before the register on a reference, may except to the report; and any defendant in contempt for want of an answer may except to the report of the register as to the sufficiency of an answer proposed to be filed by him.

Clark v. Knox, 70 Ala. 607.

PETITIONS AND MOTIONS.

95. Motions every morning.—Each morning of the term, after the first day, before the regular calls of the docket shall be commenced, motions shall be called for, when any motion or petition, not affecting the merits of a cause in court, but preparatory of the same for hearing, or in regard to other matters necessary to be brought before the court, can be submitted; and, at the calling of a cause, any incidental motion can be submitted.

96. Motions to dissolve injunctions; hearing of.—Motions to dissolve injunctions, when made in term time, may be submitted during the call for motions, on one day's notice, or at the regular call of the docket; but if the cause is then ready for hearing on the merits, the court must proceed with the hearing, without taking up the motion separately. When there is a demurrer for want of equity or other cause, and the motion to dissolve the injunction is made in term time, the demurrer must be heard in connection with the motion; but if there is no demurrer, or motion to dismiss for want of equity, the equity of the bill must, nevertheless, be considered by the court, and if it wants equity, it must be dismissed; but no motion shall be made to dissolve an injunction on the denials of the answer, unless the answer has been filed at least twenty-four hours. When a motion is made

to dissolve an injunction, and exceptions to the answer have been filed and remain undecided, they shall be decided by the chancellor in connection with the motion, without being in the first instance passed on by the register.

97. Notice of motions.—All special motions and petitions, which are not, by the practice of the court, considered ex parte, must be made and heard upon one day's notice in writing, unless notice is waived.

INJUNCTIONS; REVIVOR; SUPPLEMENTAL BILLS.

98. Where exceptions to answer overruled, chancellor may dissolve injunction.—Where exceptions have been filed to an answer for insufficiency, and decided by the chancellor to be not well taken, it shall be in his discretion to dissolve the injunction without motion or further argument.

99. Defendant not brought in before second term, injunction dissolved.—When a complainant in an injunction bill takes no steps to bring in a defendant before the second term after an injunction has been obtained, the same shall be dissolved of course.

100. Applications to reinstate injunctions; appeals.—All applications to reinstate injunctions must be made, in the first instance, to the chancellor who pronounced the order of dissolution, and, when made in vacation, must be on petition, setting forth the grounds of the application; the facts of which petition must be verified by affidavit. A copy of this petition must be served, with a notice of the time and place of the application, on the defendant or his solicitor, at least ten days before the hearing of such application, unless the chancellor, for sufficient reasons, set forth in the petition, dispenses with notice to the opposite party, and then it can be heard ex parte on presentation. If the application is refused, the complainant can appeal to a judge of the supreme court, if that court is not in session; but, should it be in session, the appeal must be to that court, and not to a judge thereof.

101. No abatement on account of feme sole complainant's marriage.—No suit instituted by an unmarried woman, or in which she shall be complainant, shall abate by her intermarriage; but her husband may make himself a party on motion, of course, at or before the second term after such intermarriage.

102. Revivor upon death, marriage, or expiration of office. Upon the death of a plaintiff, no bill of revivor shall be necessary to revive the suit, unless so directed by the chancellor; but his personal representatives or heirs, or both, as the case may require, shall be made parties, on motion ex parte, before the register in vacation, or the chancellor in term time. So, upon the death of a defendant, instead of proceeding by bill to revive against his personal representative or heirs, upon a verbal suggestion to the register or chancellor, an ex parte order shall be made for a summons to issue to his personal representatives or heirs, or both, if required, to appear at a day named, and defend

in the place of the deceased; and, when such summons is served, the suit shall be considered as revived at the expiration of thirty days after service thereof, and be thereafter prosecuted against the new parties without any order of revivor. When the complainant or defendant is an executor or administrator, and his term of office expires by death, resignation, or otherwise, a similar course may be taken to make the administrator de bonis non, or other representative, of the original party in interest, a party to the suit. A legal representative or heir may come in voluntarily and make himself a party. No process or bill shall be required to bring in the husband of a female defendant when married pending the suit, but the same shall be prosecuted to a final termination in his absence; or the plaintiff can suggest the marriage, and have an order for a summons against such husband, as in case of a representative of a deceased defendant; or such husband may voluntarily make himself a party. When a plaintiff proceeds by suggestion to bring in a representative or heir, and makes affidavit as required by the 25th rule of Chancery Practice, publication can be made against such absent heir or representative as required by said rule; and when the time therein specified expires, and such absent heir or representative fails to make himself a party, the chancellor or register shall make an order declaring such person to be a party in lieu of the deceased party; and the cause shall proceed against such absent party, and, if necessary, a decree pro confesso be entered against him; or, if the defendant is a minor, a guardian ad litem be appointed for him. This rule is not intended to prevent the parties from proceeding by bill of revivor, as directed by rules 103, 104 and 105 of the present rules of practice, or according to the English practice, if they so elect; nor to prevent the chancellor from directing the cause to be revived by bill, whenever he deems such course proper.

Floyd v. Ritter, 65 Ala. 501.

103. Supplemental bills and bills of revivor; recitals and contents of.—In filing supplemental bills, bills of revivor and supplement, it shall not be necessary to recite any part of the original bill, nor any part of the subsequent proceedings; but in supplemental bills it shall be sufficient to refer to the original bill, and state the new matter; and in bills of revivor, the cause requiring the revivor, with the appropriate prayer.

104. Proceedings and practice in relation to.—Summons on supplemental bills, bills of revivor and supplement shall be returnable to a day certain, not less than thirty days from the time of its issue; and, on its being executed thirty days, the chancellor or register, in vacation, or the chancellor, in term time, may, if the supplemental matter be not answered, order the same to be taken pro confesso, subject to be set aside on filing sufficient answer, or, if it be a bill of revivor, order the suit to stand revived, or, if the bill calls for an answer to the original bill, decree that the same be taken pro confesso, or direct proceedings to enforce an answer, by attachment or sequestration, as directed in the foregoing rules, either as to the original or supplemental matter. No summons, however, to revive or to answer the original or supplemental matter, under this rule, shall be returnable to a day beyond the first day of the next

term; but if thirty days do not intervene between the filing of the bill and the next term, the summons shall issue returnable to that term; and if executed five days before its commencement, the decree pro confesso, or order to revive, or to enforce an answer, shall be then made, unless good cause be shown to the contrary.

105. Publication, order of.—Orders of publication against defendants who cannot be served shall be made on supplemental bills, bills of revivor, or bills of revivor and supplement, as upon original bills; and after the expiration of the time required to answer or show cause, supplemental matter may be taken pro confesso, or the suit revived, as to such defendant. Where the original bill has not been answered, service can be perfected under an order of publication on the supplemental bill, or bill of revivor, and an answer required, followed by a decree pro confesso.

106. Costs in cases of abatement.—Suits or decrees may be revived for costs; and whenever any suit in chancery is allowed to abate, in consequence of the death of any one or more of the parties, complainants or defendants, the court of chancery shall decree against the parties then alive such costs to be taxed by the register, as accrued at the instance of such living parties, and shall award a summons to the legal representative of such party as may be dead, to show cause why the costs which had accrued against such deceased party shall not be decreed against such representative, to be levied of the estate of said decedent in his hands to be administered; and upon service of said summons, or return of two successive writs of summons "not found," and no sufficient cause being shown, the court shall decree accordingly; but no decree can be rendered under this rule against the representative until eighteen months after the grant of letters, and if the estate be reported insolvent, the decree shall be certified as judgments at law against such estate.

MORTGAGE SUITS.

107. Allegation as to subsequent incumbrancers; decree as to sale and proceeds.—In mortgage suits, it shall be sufficient to bring in subsequent incumbrancers to state that they claim some interest in the subject of the bill, and pray for a summons to them to answer; and the court shall have power to decree a sale, and direct the proceeds to be brought into court, without adjusting the priorities between such parties, unless there be some equity shown which makes it necessary; and any person, whether a party to the suit or otherwise, shall have the liberty to present his claim, by petition to the court, for the proceeds of the sale before distribution.

108. Proceedings when subsequent incumbrancers discovered before confirmation of sale.—If it shall be discovered that there are subsequent incumbrancers, or parties in interest not parties to the cause, at any time before confirmation of the sale in any mortgage suit, the complainant or purchaser shall

have liberty to bring them before the court at that stage of the proceedings; and if they make no opposition by answer, their interest may be foreclosed without a resale of the property.

COSTS.

109. Costs, decree as to.—Upon the decision of any interlocutory motion or question, the court or chancellor may impose such portion of the costs of the suit upon either party as to the chancellor may seem proper.

110. Proceedings, if execution for costs returned "no property."—Whenever an execution out of chancery for costs shall be returned "no property," in whole or in part, the register may issue a summons to the party who was not decreed to pay costs, to show cause why he should not be decreed to pay such portion of the costs as were incurred at the instance of such party; and on the return of said summons "executed," or two consecutive summons "not found," and such party not showing sufficient cause to the contrary, the court may decree that the party pay such portion of the costs as were incurred at his instance, or the court may decree any part of the costs which accrued at the instance of such party to be paid by him.

RECEIVERS.

111. One receiver for same property, though more than one suit.—Where there are more suits than one in which a receiver is required, whether the suits be in the same or different courts or divisions, but one receiver shall be appointed for the same property; and should the receiver be appointed in a suit not entitled to priority, he shall hold the property, funds and proceeds subject to discharge the liens of the parties in their regular order of priority, and the chancellor who may have appointed him shall so decree, and the same shall be so applied.

112. Order, where there is one receiver and two or more suits.—Where two or more bills are filed in different courts or divisions, and a receiver shall have been appointed in one of them, the complainants in the other suits, on producing a certified copy of the proceedings in their causes to the court where the receiver shall have been appointed, shall be entitled to an order that such receiver hold the property, or the funds and proceeds, to be applied according to the prior liens of the several cases, without regard to the first decree; and in such case the creditors or complainants in the suits in which the receiver was not appointed, if dissatisfied with the receiver appointed in the other suit, may move the court in which the receiver was appointed for his removal, and the appointment of another; and a sufficient cause being shown, the court must remove him and appoint some one else.

MISCELLANEOUS PROVISIONS.

113. Suit at law and in chancery for same claim.—Where a suit at law and a bill in chancery are instituted for the same claim, the opposite party, on suggestion supported by affidavit, may move the court, in term time, or the chancellor, in vacation, to inspect the records; and if it appear that the two suits are for one and the same cause of action, it shall be ordered that the plaintiff or claimant elect in which he will proceed, and that he dismiss the other.

Duval v. McLoskey, 1 Ala. 711; Ex parte Alabama Gold Life Ins. Co., 59 Ala. 192; Chapman v. Lee, 64 Ala. 483.

113*a*. Sales of personal property.—The chancellor, in term time and in vacation, and the register, in vacation, may order the sale of any personal property in the hands of a receiver, executor, or administrator, over which the chancery court has taken jurisdiction. The application for such sale must be in writing, and, when made before the chancellor, the movant must give ten days' notice of the time and place of hearing to all parties in adverse interest, or their solicitors of record. When such application is to be heard before the register, such register must give the notice required above. From all rulings by the register on such motion, either party may appeal to the chancellor without giving bond; such appeal to be heard at such time as the register may appoint, not less than five days from the decision appealed from; and the costs of the appeal are to be taxed against the unsuccessful party. Sales under such orders shall be governed by the laws applicable to sales of personal property under orders of the probate court, and reports thereof shall be made to the chancery court. Adopted Feb. 18, 1885.

114. Necessary papers laid before chancellor on motions and appeals.—On the hearing of all motions, appeals, and other applications before the chancellor in vacation, certified copies of such of the papers on file as will enable him to decide the matters submitted understandingly, shall be laid before him.

115. Notice, length of.—In all cases where, by the English orders of practice, two days' notice is required, one day shall be deemed sufficient, unless the chancellor shall otherwise direct.

116. Notice, upon whom served.—Service of notice in relation to any supplemental bill, amendment, decree, motion, or other proceeding in the chancery court, on the guardian ad litem or next friend of any party, is a sufficient and valid service as to the party represented by such guardian ad litem or next friend.

117. Computation of time.—In the computation of time under these rules, in the giving of notice and the making of motions and other applications, the day on which the notice is given shall be included, and that on which the motion or other application is to be heard shall be excluded. Where one day's notice shall be required, the motion or application may be heard the next day after the notice is served.

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ERRATA.

In the analysis of chapter 3 of title 6, part 1, reference to article 6 is an error. This article was stricken out of the chapter by the commissioners, but the reference was left in the analysis.

§ 189. For "found due *him* by the governor," read "found due by the governor."

§ 387. For "each *officer*," in next to the last line, read "each *office*."

§ 446. For "*officers* of such county," in the fifth line, read "*officer* of such county."

§ 609. For "of any land for taxes," in the first line, read "of any land *sold* for taxes."

§ 683*a*. For "without *any* regard," in the fifth line, read "without regard."

§ 948. For "where the *bonds*," in the second line, read "where the *books*."

§ 960. For "against *trespasses*," in the last line of subdivision 4, read "against *trespassers*."

§ 1282. For "such duties as are," in the last line of subdivision 6, read "such *other* duties as are."

§ 1373. Number of section erroneously printed 1573.

§ 1500. For "all *the* necessary," in the first line of subdivision 8, read "all *other* necessary."

§ 1785. For "*a* person," in the fifth line, read "person."

§ 1849. For "*right* of creditors," in the last line, read "*rights* of creditors."

§ 2015. For "on the estate ———," in the fifth line, read "on the estate *of* ———."

§ 2245. Number of section erroneously printed 2445.

§ 2327. For "*or*," in the third, fifth, sixth and eighth lines, read "*nor*."

§ 2409. For "to give a new *and* additional bond," in the sixth line, read "to give a new *or* additional bond."

§ 2454. For "verified by *the* affidavit," read "verified by affidavit."

§ 2494. For "*received* and removed," in tenth line, read "*reserved* and removed." Both the printed act and original manuscript use the word *reserved*, though in the opinion of the commissioner, the word *received* was intended.

§ 2510. For "any church or place," in the fifth line, read "any church or *other* place."

§ 2610. For "in a newspaper nearest," in the sixteenth line, read "in a newspaper *published* nearest."

§ 2713. The reference to the Code of 1876 should be (2950).

§ 2923. Number of section erroneously printed 9223.

§ 3173. Reference to the Code of 1876 should be (3426, 3427).

§ 3201. For "his *grantors*," in the third line, read for "his *grantees*."

§ 3247. For "an *individual* interest," in the second line, read "an *undivided* interest."

§ 3442. For "not *require* to plead," in the third line, read "not *required* to plead."